

## FRASERS NEWSLETTER - AUGUST 2017

In this edition of our newsletter we report on:

- (i) new decree on corporate governance for public companies;
- (ii) a draft decree on trade promotion;
- (iii) a draft decree on selection of investors in accordance with the law on tender;
- (iv) new circular amending a number of methods for determining power purchase price and model power purchase agreement; and
- (v) new circular on electricity licences.

We trust that you find this edition of our newsletter an interesting read and welcome any feedback or comments you may have on any of our topics. Our address for comments is [legalenquiries@frasersvn.com](mailto:legalenquiries@frasersvn.com).

Whilst we aim to provide a useful update on new legislation, Frasers' Newsletter does not constitute formal legal advice. Should you feel that you require further information on any of the issues in this edition of the Newsletter, please contact us at the address above or via your usual Frasers' legal adviser.

### NEW DECREE ON CORPORATE GOVERNANCE FOR PUBLIC COMPANIES

On 6 June 2017, the Government issued Decree No. 71/2017/ND-CP (**Decree 71**) on the corporate governance of public companies, replacing the current regulations under Circular No. 121/2012/TT-BTC.

Decree 71 came into effect on 1 August 2017. Some notable changes contained under Decree 71 as compared to the previous legislation include (but are not limited to) the following:

- (i) As from August 2020, the Chairman of the Board of Directors (**BOD**) of a public company cannot concurrently serve as Director (or General Director) of such company (Article 12.2);
- (ii) As from August 2019, members of the BOD of a public company cannot concurrently serve as members of the BOD of more than five other companies (Article 12.3);
- (iii) The BOD of listed public companies must have at least one-third of its members being

independent members. Meanwhile, for the BOD of unlisted companies which chose to follow the model of an internal auditing committee under the BOD (instead of a separate supervisory board), at least one-fifth of the BOD members must be independent (Article 13.4 and Article 13.5);

- (iv) Independent BOD members shall make independent annual reports on the activities of the BOD, and such reports can be made available to the Annual General Meeting of Shareholders (AGM) (Article 16);
- (v) The Head of the Supervisory Board of a public company must be a professional, registered accountant or auditor, and must work on a full-time basis at the company (Article 20);
- (vi) Decree 71 also imposes further requirements aimed at increasing the transparency of information for public companies, such as a mandatory disclosure to the AGM of the income of Director/General Director and other managerial persons in the annual financial statements, a public disclosure obligation of any change of the public company's corporate governance model within 24 hours, etc.

## DRAFT DECREE ON TRADE PROMOTION

The Government recently published a draft decree amending Decree No. 30/2006/ND-CP on trade promotion (*Draft Decree on Trade Promotion*).

The Draft Decree on Trade Promotion regulates advertising and commercial promotions (discount programmes, clearance sales, trade fairs and exhibitions, etc.) and contains some significant changes as compared to the current legislation, which include, among others:

- (i) With respect to promotions in the form of price reductions, the cap on maximum discounts (currently fixed at 50% of the price of the relevant goods or services immediately before the sale promotion period) is removed with respect to certain categories of goods and services, including fresh and raw products, as well as goods and services sold by traders in the process of liquidation (Article 1.5);
- (ii) With respect to the procedures for notifying the relevant state authorities, being the MOIT or the relevant Department of Industry and Trade (*DOIT*), of the proposed promotional campaigns (Article 1.17):
  - (a) The Draft Decree removes the 7 day prior notification requirement currently applicable to promotion schemes, and specifies that the relevant notifications can be carried out any time prior to the scheme being implemented;
  - (b) The notification requirement is also removed (i) when the total value of the promotional goods and services is less than VND 100 million; and (ii) for businesses only conducting promotions via e-commerce trading platforms or online promotion websites.
- (iii) With respect to the procedures for registering promotional campaigns with the relevant authorities (being the MOIT or the DOIT), the Draft Decree on Trade Promotion reduces the time available for the MOIT or DOIT to respond to a registration dossier from 7 days (as provided under the current legislation) to only 5 days. In addition, the Draft Decree on Trade Promotion allows traders to implement promotions schemes if they do not receive a response from the authorities within the above 5 day period (Article 1.18);
- (iv) With respect to commercial exhibitions, under the current Decree No. 30/2006/ND-CP, the deadline for registering proposed commercial exhibitions (whether domestic or overseas) with the relevant authorities is the 1 October of the year preceding the date of the exhibition. Under the Draft Decree, the registration period is instead reduced to only 30 days prior to the date of the exhibition for domestic events, and 45 days for overseas events. The Draft Decree on Trade Promotion further provides that following the receipt of a complete registration dossier, the authorities must issue a response within 7 days, and traders are allowed to carry out the exhibitions if they do not receive any response from the authorities within such 7 day deadline.

- (v) With respect to seasonal or periodical promotional campaigns (which last for a day, a week, a month or a season), if such campaigns are organised by State agencies the maximum discount offered cannot exceed 70% of the price of the relevant goods or services immediately before the sale promotion period. This is a major change as compared to the current regulations which impose a threshold of 50% discount applicable to all cases of promotions, regardless of whether they are organised by State agencies (Article 1.4 and 1.5 of the Draft Decree).

## **DRAFT DECREE ON SELECTION OF INVESTORS IN ACCORDANCE WITH THE LAW ON TENDER**

On 2 August 2017, the Ministry of Planning and Investment published a working draft of a decree (***Draft Decree on Tender***) amending Decree 30/2015/ND-CP on selecting investors in accordance with the Law on Tender (***Decree 30***).

The Draft Decree on Tender contains some significant changes as compared to the current legislation, which include, among others:

### **(i) Governing scope of the Draft Decree on Tender**

Under Article 1 of Decree 30, there are two types of projects which fall within the scope of Decree 30, namely: (i) PPP projects; and (ii) projects using land with high commercial value to develop constructions in urban areas or new urban areas in the sectors of commercial housing, commercial and service works, multi-purpose complexes.

The Draft Decree on Tender proposes to amend its scope with respect to the selection of investors for projects using land. In particular, a project using land will be subject to the investor's selection procedures under Decree 30 when: (i) it satisfies the criteria set out in Decree 30 for projects using land that require the selection of investors; (ii) the project is located in urban areas or new urban areas and is in the sectors of commercial housing, commercial and service works, multi-purpose complexes, or in the sectors of entertainment, education, vocational education, medical care, culture and environment. Article 11 of the Draft Decree on Tender also provides additional provisions on the criteria for projects using land which require the selection of investors, and delegates to the relevant provincial people's committee being the authority to approve the list of such projects.

### **(ii) Methods of investors' selection for PPP projects**

The Draft Decree on Tender provides two separate provisions with respect to the methods of investors' selection for PPP projects and projects using land.

With respect to PPP projects, Article 9 of the Draft Decree on Tender proposes that only "Group A" projects will be required to undergo an international public tendering process<sup>1</sup>. Projects in "Group B and C", and projects in sectors that are restricted to foreign investors, will instead be subject to national public tendering. The Draft Decree on Tender also sets out more detailed rules with respect to projects that can be assigned directly to a specific investor, such as projects for the purpose of national defense and projects for innovation of old residential buildings. The above mentioned projects must be implemented in the form of a BT contract, and the relevant state authority must arrange sufficient land for implementing the project or specify which assets will be owned by the investor when operating the project.

### **(iii) Methods of investors' selection for projects using land**

Under Article 10 of the Draft Decree, the selection of investors for projects using land shall be in the form of international public tendering or national public tendering, depending on the country of origin of the tenderers.

The Government may directly appoint an investor if there is only one investor able to implement the project or upon a specific Government decision based on criteria such as the

technical and financial feasibility of the project, the investor's experience and capability, the project's social and economic impact, etc.

(iv) **Investors' selection in special cases**

Article 85 of the Draft Decree on Tender proposes that in cases where there are special circumstances making it impossible to select investors via public tendering or via direct appointment of the investor, the Prime Minister may approve a different method for investors' selection. The Draft Decree on Tender provides procedures and timeline for the approval of the investors' selection in such special cases. However, the Draft Decree on Tender does not stipulate the criteria according to which a project may fall within the "special cases" for which such Prime Minister's approval can be granted.

## **NEW CIRCULAR AMENDING A NUMBER OF METHODS FOR DETERMINING POWER PURCHASE PRICE AND MODEL POWER PURCHASE AGREEMENT**

On 3 August 2017, the MOIT issued Circular No. 13/2017/TT-BCT amending and supplementing a number of articles of Circular No. 56/2014/TT-BCT providing methods for determining power price and procedures for verifying power purchase agreements, Circular No. 30/2014/TT-BCT on a competitive market for power generation and Circular No. 57/2014/TT-BCT on methods and procedures for preparing and issuing electricity price frames (*Circular 13*).

Circular 13 will come into effect on 19 September 2017. Some notable changes contained under Circular 13 as compared to the current legislation include (but are not limited to) the following:

- (i) Circular 13 amends a number of formulae for calculating power purchase prices. The formulae that have been changed include, among others, the formula for calculating the variable price upon the changes in cost of main fuel (Article 7.1 of the amended Circular 56), and the formula for determining the cost of transportation of the main fuel with respect to thermal power plants (Article 8 of Circular 56).
- (ii) The amended Article 20.1 of Circular 56/2014/TT-BCT requires that a power purchase agreement (*PPA*) must be signed before the commencement of the construction of the relevant power plant or before the pilot period for the power plant to connect with the national power grid.
- (iii) Article 1.17 of Circular 13 amends Article 2.2 of the Model PPA attached to Circular 56/2014/TT-BCT, and now provides that the duration of a PPA is 25 years from the commercial operations date. Article 5 of Circular 13 consequently requires EVN and power plants to amend the term of the PPAs signed before the effective date of Circular 13 in order to be consistent with the new 25 year term provided for under Circular 13.
- (iv) Article 3 of Circular 13 inserts an entire new chapter (VIa) following chapter (VI) in Circular 30/2014/TT-BCT. Chapter (VIa) governs the participation in the competitive power generation of captive power generation plants in industrial zones. According to these new provisions, power plants in industrial zones having a capacity of more than 30MW which are connected to the national grid and sell a part of their generated power to EVN will now be required to register with the Electricity Regulatory Authority in order to participate in the electricity market (with the exception of those power plants whose PPA was signed before 1 January 2016 and became effective after 1 January 2016).

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<sup>1</sup> The classification of projects into Group A, B and C is regulated under Law No. 49/2014/QH13, entitled the Law on Public Investment, passed by the National Assembly of Vietnam on 18 June 2014, and is based on the importance, the objectives and the capital of each project.



## NEW CIRCULAR ON ELECTRICITY LICENCES

On 31 July 2017 the Ministry of Industry and Trade (**MOIT**) issued Circular No. 12/2017/TT-BCT on the procedures for granting and revoking electricity operation licences (**Circular 12**).

Circular 12 will become effective on 14 September 2017 and will replace Circular 10/2015/TT-BCT on the procedures for granting and revoking electricity operation licences (**Circular 10**). Some notable changes contained under Circular 12 as compared to the current legislation include (but are not limited to) the following:

- (i) Article 3 of Circular 12 sets out exemptions from the requirement of obtaining an electricity operation licence, such as in case of power generation for self-consumption, power plants having a capacity of up to 1 MW, and power distribution (i.e., purchasing power having capacity of less than 50kVA and selling it directly to consumers) in sub-urban areas, mountains, or islands. It should be noted that Circular 12 increases the capacity of power plants exempted from the electricity operation licences (under Circular 10, only power plants having capacity of up to 50KW were exempted from the requirement of obtaining an electricity operation licence).
- (ii) Article 4 of Circular 12 provides the principles for issuing the electricity operation licences and specifies that, until Vietnam will reach the stage of a competitive retail market for electricity (as is contemplated under the Law on Electricity), the electricity retail licence shall be granted only in conjunction with an electricity distribution licence.
- (iii) Similar to Circular 10, Circular 12 stipulates specific terms for each type of electricity operation licence (e.g. ten years for an electricity distribution licence, ten or twenty years for an electricity generation licence, etc.). However, Circular 12 also allows the applicants to request and obtain licences for shorter terms.
- (iv) Circular 12 provides a new requirement in relation to the timeline for the submission of the application dossier for obtaining an electricity operation licence. While Circular 10 did not provide a specific timeline, Article 12.1 of Circular 12 now requires that the full set of application documents must be submitted no later than 30 days prior to the estimated official operation date of the power plant.

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