

CLIENT ALERT

NEW DECREE ON EQUITISATION OF SOES HAVING 100% EQUITY OWNED BY THE STATE

On 16 November 2017, the Government issued Decree 126/2017/ND-CP on the equitisation of State-owned Enterprises (**SOEs**) having 100% equity owned by the State (**Decree 126**). Decree 126 will come into effect on 1 January 2018 and it will replace Decree 59/2011/ND-CP and all of its amendments (**Decree 59**).

Please see below a high level overview of some of the key points contained in Decree 126.

1. Requirements for strategic investors

Strategic investors may be Vietnamese investors or foreign investors. A strategic investor must meet the following requirements (Article 6):

- a) The strategic investor must have legal capacity;
- b) The strategic investor must have financial capacity and its business activities over the past two years must have been profitable; and
- c) The strategic investor must undertake in writing to:
 - i) maintain the main business activities and trademarks of the equitised company for a period of at least 3 years. If the trademarks of the equitised SOE are on the list of national trademarks, the Prime Minister will decide the period for maintaining the main business activities and trademark(s) of such SOE;
 - ii) not transfer the shares held by the strategic investors for at least 3 years from the date of issuance of the Enterprise Registration Certificate;
 - iii) provide the target SOE with technical assistance, training, material supplies, a market development plan; and
 - iv) compensate for any breach of any transaction documents committed by the strategic investor. The State will have the right to dispose of the shares purchased by the strategic investor in case of default by the strategic investor.

While previously under Decree 59 strategic investors were subject to a lock-up period of five years, during which period they were not permitted to transfer their shares in the target SOE, the lock-up period has now been reduced to only 3 years.

It is also worth noting that Decree 126 provides that only SOEs in which the State (after the

equitisation) will continue to hold more than 50% of the charter capital may offer their shares initially to strategic investors. This provision suggests that other SOEs in which the State (after the equitisation) will not hold the majority of the shares may not be able to offer their shares to strategic investors during the equitisation process. We will issue further guidance on this matter once it becomes available.

At the moment it is also unclear as to what actions a strategic investor can take in order to fulfill its undertaking of maintaining the main business and the trademarks of the target SOE post-equitisation.

2. Offering shares to qualified strategic investors

Schedule I of Decree 126 sets out the process for the selection of strategic investors as outlined below:

Step 1: The Working Group under the Equitisation Steering Committee will set out, among other matters, the criteria for strategic investors, share portions to be sold to strategic investors (***the Strategic Investor Plan***).

Step 2: The Steering Committee will consider the Strategic Investor Plan and will submit it to the relevant authority for approval together with the overall equitisation plan (***the Equitisation Plan***).

Step 3: Once the Equitisation Plan is approved, the equitising SOE must publicly announce it in both Vietnamese and English, covering in particular the contents relating to the offer of shares to the Strategic Investors.

Step 4: Within 20 days from the date of the announcement, the equitising SOE will select the potential strategic investors who meet all the required criteria and report to the relevant authority for approval.

Step 5: The equitising SOE will offer shares to the potential strategic investor(s) via (i) auction among those potential strategic investor(s) (if the total number of shares that the potential strategic investors wish to buy is higher than the approved number of shares to be sold to strategic investor(s) under the Equitisation Plan); or (ii) direct agreement with each potential strategic investor (if the total number of shares that the potential strategic investors wish to buy is lower than the approved shares to be sold to strategic investors under the Equitisation Plan). Under the scenario in (ii) above, the difference between the shares actually sold to the strategic investors and those approved under the Equitisation Plan shall be offered to the public, subject to the approval of the relevant authority.

Step 6: Execution of the share purchase agreements with the strategic investors and payment of the purchase price.

Previously under Decree 59, the equitised SOE was allowed to offer shares to strategic investors either after or before the public offer. However, Decree 126 makes it very clear that the selection of, and offer of shares to, the strategic investors must be completed after the public offer.

The purchase price paid by the qualified strategic investors shall not be less than the average price of the public offer.

3. Regulations on handling financial issues prior to and in the process of equitisation

Chapter II of Decree 126 sets out regulations on handling financial issues, including how to determine the assets and liabilities of the equitised SOE, prior to and during the process of equitisation.

Notably, with respect to equity investments by the equitised SOE in other companies, if such equity investments will remain with the SOE post-equitisation, such equity investments will be taken into account when evaluating the SOE.

If the equity investments do not remain with the SOE post-equitisation, the equitised SOE must report to the relevant authority representing the State capital in order to:

- i) reach an agreement with the partners of such company to transfer the equity investment to another SOE;
- ii) sell the equity investment to the existing partners or other investors; or
- iii) if at the time of valuation, the equitised SOE fails to transfer or sell the invested capital, such equity investment will remain with the SOE post-equitisation.

If the SOE has any equity investment in foreign invested companies, and if there is any provision in the capital contribution contract or investment license stating that after the expiry of the operation term of the foreign invested company, the foreign invested company must hand over all assets without compensation to the Vietnamese party, such equity investment must remain with the SOE post-equitisation. Once the operation term of the foreign invested company of which the equitised SOE has contributed capital expires, the joint stock company (i.e., the SOE post-equitisation) will transfer these assets to the State in accordance with the regulations on management and use of the State's assets.

4. Policy on the sale of shares to employees

Decree 126 provides that the employees of an equitised SOE and the employees of the subsidiaries of an SOE being equitised are also entitled to buy shares in the equitised SOE. For each year of employment with the SOE or its subsidiaries, an employee will be entitled to buy 100 shares at a price being 60% of the par value per share.

Please contact us at legalenquiries@frasersvn.com if you would like to discuss Decree 126 or the equitisation process further.

Ho Chi Minh City

Unit 1501, 15th Floor, The Metropolitan
235 Dong Khoi Street, District 1
Ho Chi Minh City, Vietnam
Tel: +84 28 3824 2733

Email: legalenquiries@frasersvn.com

Hanoi

Unit 1205, 12th Floor, Pacific Place
83B Ly Thuong Kiet Street, Hoan Kiem District
Hanoi, Vietnam
Tel: +84 24 3946 1203

Website: www.frasersvn.com

This article provides a summary only of the subject matter covered, without the assumption of a duty of care by Frasers Law Company.

The summary is not intended to be nor should it be relied on as a substitute for legal or other professional advice.