

## NEW LAW ON INVESTMENT AND NEW LAW ON ENTERPRISES

The introduction of the Law on Investment and Law on Enterprises in 2005 marked a significant progression in the development of Vietnam's legal system and bolstered investor interest and business activities in Vietnam. The introduction of these two laws marked the first time in nearly two decades of economic reform that Vietnam had in place a unified legal corporate framework which could apply to investors and businesses operating across a variety of sectors.

However, after almost 10 years of implementation, current practices have emphasised the need for a transformation of the legal instruments regulating investment and enterprises in Vietnam, in order to ensure the transparency and equity of the business environment. Responding to this need, the National Assembly of Vietnam passed the new Law on Investment No. 67/2014/QH13 on 26 November 2014 (**New LOI**), and the new Law on Enterprises No. 68/2014/QH13 (**New LOE**), which will replace the previous laws as from 1 July 2015.

### LAW ON INVESTMENT

The main objectives of the New LOI are to further improve Vietnam's investment climate in terms of quality and efficiency, thus attracting investment that is consistent with the priorities set out in the country's socio-economic development strategy for the period 2011 to 2020. Certain notable provisions of the New LOI are provided below.

#### Foreign Investor

The New LOI provides clearer interpretation of a foreign investor (**Foreign Investor**). In addition, the New LOI stipulates a clear difference for thorough use of the terminologies of "foreign investors" and "economic organisations with foreign investment capital" replacing the often ambiguous term "foreign invested enterprise" as provided under the Law on Investment No. 59/2005/QH11, adopted by the National Assembly of Vietnam on 29 November 2005 (**Current LOI**).

A Foreign Investor is defined in the New LOI as an individual with foreign nationality; or an organisation established in accordance with foreign laws conducting business investment activities in Vietnam.

## Foreign Owned Enterprise

Under the New LOI, an economic organisation with foreign investment capital or a foreign owned enterprise (**FOE**) is broadly defined to mean any organisation with a Foreign Investor being a member or shareholder.

In addition to the definitions of Foreign Investor and FOE, the New LOI introduces the concept of FOE with majority foreign-owned capital (**51% FOE**), which will have the same investment conditions as those applicable to Foreign Investors. In particular, an FOE will be considered a 51% FOE if it has:

- (i) at least 51% of its charter capital held by a Foreign Investor (**Foreign Dominated Organisation**); or
- (ii) at least 51% of its charter capital held by the Foreign Dominated Organisation; or
- (iii) at least 51% of its charter capital held by both Foreign Investor(s) and the Foreign Dominated Organisation(s).

## Investment Incentives

In addition to projects falling under those industries or geographical areas which are entitled to preferential treatment, under the New LOI the following additional projects are also entitled to various investment incentives:

- (i) projects having capital of VND6 trillion (approximately US\$278 million), to be contributed within three years from the date of issuance of the Investment Registration Certificate (**IRC**) or approval in principle (as referred to in Section "Approval In Principle" below);
- (ii) projects in rural areas employing 500 employees or more; and
- (iii) hi-tech enterprises, and scientific and technological enterprises or organisations.

## Investment Conditions and Sectors

Under the New LOI, investment activities conducted by a Foreign Investor and/or a 51% FOE would be subject to the additional conditions which fall under conditional sectors compared to those conducted by domestic investors. The law provides a consolidated and unified list of 267 conditional sectors, which may only be amended from time to time by the National Assembly of Vietnam.

As from 1 July 2015, the conditions imposed on projects in conditional sectors will be governed by the relevant laws, ordinances, decrees and international treaties, but not by any other type of legal documents as under the current regime. Thus, no ministries, People's Committees or any other licensing authorities can issue any legal documents setting out their own conditions applicable to investment projects in conditional sectors.

We note that any investment conditions prescribed in any legal document which has been introduced before 1 July 2015 and is inconsistent with the New LOI shall no longer have any effect as from 1 July 2015.

## Investment Guarantees

Under the New LOI, the scope of an investment guarantee granted by the Government is more limited than under the Current LOI. In particular, currently the Government may consider providing guarantees for loans, supply of raw materials, sale of products, payment and performance guarantees of other contractual obligations to projects. According to the New LOI, the Prime Minister may decide to provide a guarantee for the performance of contractual obligations of a State agency and/or a State-owned enterprise participating in investment projects which are subject to approval in principle by the National Assembly and/or by the Prime Minister and other important investment projects for the development of infrastructure.

## Investment Forms

The New LOI classifies different forms of investment, consisting of:

- (i) establishing an economic organisation (i.e. legal entity) to develop a project;
- (ii) contributing capital, purchasing shares or capital contribution of an economic organisation; and
- (iii) investing by way of a contractual arrangement (e.g. PPP contract, BCC contract).

## Investment Registration Certificate

According to the New LOI, an investment in the form of the establishment of an economic organisation will require a Foreign Investor to go through a two-step licensing process as follows:

- (i) application for obtaining an IRC which is issued to the Foreign Investor itself rather than to the FOE; and
- (ii) registration for establishment of an enterprise by obtaining an enterprise registration certificate (**ERC**) for the FOE.

The following projects will require investors to obtain IRCs:

- (i) an investment project of a Foreign Investor; and/or
- (ii) an investment project of a 51% FOE.

Although it is not entirely clear, it appears that an IRC will not be required by a Foreign Investor undertaking an M&A transaction. However, investors (including a Foreign Investor and domestic investor) is still required to register their acquisition with the relevant authorities if (i) such acquisition results in the holding of 51% or more by such investor in the target economic organisation; or (ii) the target economic organisation engages in a conditional sector applicable to Foreign Investors.

While there are no significant changes to the application dossier for obtaining an IRC compared with that for an Investment Certificate (**IC**) under the Current LOI, the statutory timeline for issuance of an IRC is much shorter. In particular, under the New LOI, an IRC should be issued within 15 days after submission of a complete application dossier as opposed to 45 days with respect to the IC as provided under the Current LOI.

## Approval In Principle

The New LOI provides in more detail the procedures for obtaining “approval in principle” which has long been applied in practice with respect to certain important projects (**Approval In Principle**). Approval In Principle must be obtained prior to the submission of an application for issuance of an IRC and ERC. The requirement of Approval In Principle replaces the investment evaluation for the purpose of issuance of the IC as provided under the Current LOI.

Depending on the scale and nature of each investment project, the following authorities would have the right to issue Approval In Principle: National Assembly; Prime Minister; and provincial People’s Committees.

## Duration of Investment Projects

Whereas the Current LOI provides the duration of operation of a foreign invested project to be 50 years, with a possible extension to 70 years as per the approval of the Government, the New LOI has extended such duration of operation of an investment project to 70 years in respect of projects in economic zones, and 50 years in respect of projects outside economic zones. It is noted that under the New LOI, such duration of an operation is applicable to both domestic and foreign projects.

## Deposit for Project Implementation

An investor may be required to lodge a deposit as a guarantee for implementation of an investment project in which the investor is allocated or leased land by the State. The deposit rate will range from 1% to 3% of the total investment capital. The Government will issue further guiding regulations on this matter.

## Dispute Settlement

Under the Current LOI, an FOE can agree to choose foreign and/or international arbitration to resolve disputes. However, according to the New LOI, only Foreign Investors or 51% FOEs can agree to choose foreign and/or international arbitration to resolve disputes relating to their “business investment”.

Business investment is defined in the New LOI as “an investment of capital to do business by establishing an economic organisation; an investment of capital contribution, purchase of shares or capital contribution of a business organisation; an investment in the form of contracts or implementation of an investment project”.

## Transitional Provisions

The New LOI specifically provides that an investor which is issued with an IC prior to 1 July 2015 may continue implementing its investment project in accordance with such IC without having to apply for a new IRC. However, investors are entitled (but not obliged) to request the relevant licensing authority to issue an IRC to replace their IC. Nevertheless, it remains unclear upon issuance of the new IRC, whether or not an FOE has to re-register its respective operations with a new ERC in accordance with the New LOE.

Guiding regulations are expected to be issued prior to 1 July 2015 when the New LOI takes effect.

## LAW ON ENTERPRISES

The New LOE supports the requests of legislators to make enterprises the most convenient and attractive means for any investor to conduct business activities in Vietnam. With respect to the organisational structure, the New LOE maintains the backbone of the current Law on Enterprises (**Current LOE**), however, there are more than 100 new articles in the New LOE. Rigorous attempts have been made to bring about favourable and transparent conditions for enterprises establishing and operating in Vietnam. Below are certain key changes provided by the New LOE.

### Ownership Ratio of Foreign Investors

Pursuant to the New Law on Enterprises, a new definition relating to the ownership ratio of foreign investor(s) has been added. Accordingly, share or capital contribution ownership ratio of foreign investor(s) means the aggregate ratio of ownership of voting capital (instead of charter capital as previously understood) by all foreign investors in a Vietnamese enterprise.

### Lines of Business and Business Conditions

In accordance with Article 33 of the 2013 Constitution of the Socialist Republic of Vietnam, the New LOE emphasises that: "Enterprises are allowed to freely conduct lines of business which are not prohibited by law". The registered business lines of an enterprise will not be listed in its ERC as under the old law, but will be listed on the National Enterprise Registration portal and updated if there is any change in the registered business lines.

It should be noted that the New LOE introduces a list of prohibited business lines and a list of conditional business lines applicable to investors. The Government will guide the announcement of conditional business lines and control conditional business lines to the extent that the applicable conditions are for the purposes of protecting national defence and security, social order and safety, customs and traditions of Vietnam, and the health and environment of the community.

## Enterprise Registration

### *Legal capital and practising certificates*

In an attempt to lessen the burden on individuals/institutions that establish an enterprise in Vietnam, the New LOE has removed the requirement to submit a document certifying the satisfaction of legal capital and practising certificates at the registration stage. However, the relevant authority has the right to and may request a criminal record of such individuals/institutions as evidence that they are not prohibited from setting up and managing an enterprise in Vietnam. It is worthwhile to note that those individuals/institutions prohibited from setting up and managing an enterprise in Vietnam are mainly those from State sectors and those whose civil capacity is restricted, e.g. State officers, professional military officers, etc.

### *Names of enterprises written in foreign languages and abbreviated names of enterprises*

Under the New LOE, the name of an enterprise written in a foreign language shall be restricted to the name which has been translated from Vietnamese into any of the foreign languages in the Roman alphabet. When translating into a foreign language, the proper name of an enterprise may be retained or its corresponding meaning may be translated into such foreign language. The abbreviated name of an enterprise may be an abbreviation of its Vietnamese name or its foreign language name.



### ***Enterprise Registration Certificate and Investment Registration Certificate***

The New LOE requires that a foreign investor must obtain an IRC before it applies for establishment of an enterprise in Vietnam. (Please refer to further information in relation to the IRC in the section “Investment Registration Certificate” above.)

### ***Registration/Notification of changes in enterprise registration details***

A Vietnam-based enterprise must register any changes to the details of its ERC with the relevant authority, but shall only notify the relevant authority of the changes to certain details that are not recorded under the ERC, specifically the registered business lines, the founding shareholders and foreign shareholders (with the exception of listed companies).

### **Contributed Capital in form of Intellectual Property**

The New LOE specifies that only a lawful owner of intellectual property can use such property to contribute capital to form an enterprise in Vietnam. Subject to further guiding regulations, however, it is unlikely that those who “own” intellectual property via a licensing arrangement are entitled to contribute such property to set up an enterprise in Vietnam.

### **Seal of Enterprises**

The Current LOE allows an enterprise to have only one seal, which must be in a specific form with specific content as provided by law and issued by the relevant police department. The New LOE provides more flexibility in relation to the number of seals that an enterprise may have as well as the contents of such seals. In particular, an enterprise is entitled to determine the number of seals, the form as well as the contents of such seals provided that such details are specified under the charter of the enterprise. The enterprise is also responsible to provide a notification of its seal sample to the business registration authority for publishing on the National Enterprise Registration portal before it can use its seal.

### **Legal Representatives and Authorised Representatives of Enterprises**

One of the major changes found in the New LOE is the entitlement of limited liability companies and shareholding companies to have more than one legal representative. In such cases, the charter of the company must specify the number and managerial positions of the legal representatives, and the company must register the same with the relevant business registration authority. Furthermore, it is required that an enterprise must ensure that at least one legal representative resides in Vietnam.

The New LOE still allows an enterprise to specify in its charter the number of authorised representatives of a member/shareholder being an organisation. If the charter does not refer to the authorised representatives, the member/shareholder will appoint its authorised representative(s) as follows:

- (i) an organisation being a member of a limited liability company with two or more members and holding at least 35% of the charter capital is entitled to authorise up to three authorised representatives to participate in the Members’ Council;
- (ii) an organisation being a shareholder of a shareholding company and holding at least 10% of the total ordinary shares is entitled to authorise up to three authorised representatives to attend meetings of the General Meeting of Shareholders.

### **Timeline for Capital Contribution of a Limited Liability Company**

Whereas Decree No. 102/2010/ND-CP of the Government, dated 1 October 2010, implementing the Current LOE (**Decree 102**), provides that the timeline for capital contribution by each member in a limited liability company is 36 months from the date the company is established, the New LOE shortens this timeline to 90 days from the date of issuance of the ERC for the purpose of consistency with the same requirement for shareholders in a joint stock company. Unlike the Current LOE, the New LOE sets out regulations on the specific rights and liabilities of the members in accordance with their contribution ratio where the members fail to contribute its capital in full or in time.

Specifically, within the 90 day timeline as from the date of issuance of the ERC, a member of a limited liability company with two members or more (**LLC2**) will have the rights and liabilities in accordance with its committed capital contribution. After such 90 day timeline, the LLC2 will have 60 days to amend the charter capital and/or the ratio of capital contribution if a member fails to

contribute in full his/her portion as committed. Until such amendment has been made (i.e. within the 60 day period), the failing member will have rights to the extent of his/her **actual** contribution, but will be liable for the obligations of the company to the extent of his/her **committed** capital contribution.

The 90 day timeline also applies to a member/owner of a one member limited liability company (**LLC1**). However, the LLC1 will have only 30 days to amend the charter capital to be consistent with the actual contribution if the owner fails to contribute as committed. Until such amendment has been made (i.e. within the 30 day period), the owner shall be liable for the obligations of the company to the extent of his/her committed capital contribution. If the LLC1 suffers any financial liabilities, losses or damages caused by failure of contribution in full or in time, the owner shall be liable for the obligations of the company up to the amount of registered charter capital.

## **Mergers**

The current LOE only allows for mergers amongst enterprises having the same form of investment. The eligible scope for a merger of enterprises is expanded under the New LOE so that enterprises of any corporate form can enter into a merger. The New LOE offers more opportunity for enterprises operating in Vietnam to merge without having to convert such enterprises into the same enterprise form.

## **Quorum for Meetings and Voting**

The quorum has been reduced under the New LOE from at least 75% to 65% of the charter capital to convene a Members' Council Meeting of an LLC2, and from at least 65% to 51% of the charter capital to convene a General Shareholders Meeting. For an LLC1 where the member is an institution, the quorum is two-thirds of the total number of Council members.

The New LOE gives freedom to an LLC2 to provide in its charter a specific quorum to pass a resolution of the Members' Council. If the charter does not refer to such quorum, a resolution of the Members' Council of an LLC2 must be passed by at least 75% of the aggregate capital of the attending members for special decisions, and by at least 65% of the aggregate capital of the attending members for other decisions.

The quorum to pass a resolution of the General Shareholders Meeting is at least 65% of the aggregate capital of the attending shareholders for special decisions, and at least 51% of the aggregate capital of the attending members for other decisions.

For an LLC1 where the member is an institution, the quorum to pass a resolution of the Members' Council is a simple majority.

## **Management Structures**

### ***Limited Liability Company with Two Members or More***

The New LOE provides only one structure which includes a Members' Council, a Chairman and a Director/General Director. An LLC2 with 11 members or more must establish a Board of Controllers.

### ***Limited Liability Company with One Member***

The New LOE provides specific scenarios with different management structures for an LLC1. An LLC1 where the member/owner is an institution can choose either of the following structures: (i) a Chairman, a Director/General Director and Controller(s); or (ii) a Members' Council, a Director/General Director and Controller(s). However, an LLC1 where the member/owner is an individual can only have a structure which includes a Chairman and a Director/General Director.

### ***Joint stock companies***

In addition to the current management structure of a joint stock company (**JSC**) with the normal composition of a General Meeting of Shareholders, a Board of Management, Directors (or General Directors), and a Board of Controllers (applicable to a JSC having more than 11 shareholders being individuals or having organisations owning more than 50% of the company's equity), the New LOE introduces another structure available for any joint stock company, unless otherwise stipulated in the Law on Securities and its relevant implementing regulations.

The new structure allows for the removal of an Inspection Committee where at least 20% of the members of the Board of Management are independent members and have an internal auditing

committee under the Board of Management. Independent members shall supervise and control the management and operation of the company.

However, the New LOE provides no further provisions on either independent members of a Board of Management or an internal auditing committee under the Board of Management.

### **Cumulative Voting**

Under the Current LOE, voting to elect members of the Board of Management and the Board of Controllers must be undertaken by way of cumulative voting, whereby each shareholder shall have a total number of votes equivalent to the total number of shares it owns multiplied by the number of members to be elected to the Board of Management or the Board of Controllers, and each shareholder has the right to accumulate all or part of its total votes for one or more candidates.

However, under the New LOE, cumulative voting is only an option, and a JSC may include other forms of voting in its charter.

### **Private Placement**

The New LOE expressly stipulates that the offer to sell shares in a joint stock company may be implemented in any of the following ways:

offer for sale to existing shareholders;

public offer for sale; and

private placement of shares.

Public offers for sale and any share placements by a listed joint stock company and a public joint stock company shall be implemented in accordance with the Law on Securities.

The New LOE only introduces separate procedures for private placements and offers for sale of shares to existing shareholders applicable to non-public joint stock companies.

With respect to private placements of a non-public joint stock company, the New LOE expressly reduces the burden of registration by allowing the company to conduct the sale of shares if the company does not receive any objection from the business registration authority within five working days from the date of notification of the private placement to the authority.

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