

FRASERS NEWSLETTER

In this edition of our newsletter we report on:

- (i) new guidelines on the implementation of Decree 60 in relation to foreign investment in the stock markets of Vietnam;
- (ii) the legal issues surrounding bank guarantees for the sale and hire purchase of future houses;
- (iii) a summary on the compulsory registration of standard contracts and general trading conditions; and
- (iv) a short article on the agreement in-principle with respect to the Vietnam – EU Free Trade Agreement.

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 newsletter@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 our Newsletter, please contact us at the address above or via your usual Frasers' legal adviser.

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RECENT LEGISLATIVE DEVELOPMENTS ON THE REMOVAL OF RESTRICTIONS ON FOREIGN OWNERSHIP RATIOS IN THE VIETNAM STOCK MARKET

On 26 June 2015, the Government issued Decree 60/2015/ND-CP (**Decree 60**), introducing notable provisions on foreign ownership ratios applicable to the purchase of securities in Vietnam. For an in-depth look at Decree 60, please click on the following link which will take you to our Legal Update on Decree 60 in the News and Resources section of our website: [Legal Update Decree 60](#).

In summary, previously, foreign investors were only permitted to invest up to 49% of the charter capital of a listed company or public company. Following the issuance of Decree 60, foreign investors now have the opportunity to invest in those companies without any limitation, provided that all statutory conditions are satisfied. Certain matters still present a challenge to foreign investors including the current legislative provisions on conditions for raising the threshold for foreign investment which are neither clear nor comprehensive, leaving foreign investors waiting for further detailed guidelines implementing Decree 60. Guidelines are expected to be issued soon with respect to which business lines are conditional to foreign investors, according to which the threshold for foreign investment remains at 49% of the charter capital of public companies (**the 49% Threshold**).

On 19 August 2015, the Ministry of Finance issued implementing legislation for Decree 60 in respect of foreign ownership ratios, in the form of Circular No. 123/2015/TT-BTC (**Circular 123**). Contrary to expectations, Circular 123 does not provide any guidelines on conditional sectors in which foreign investors are subject to the 49% Threshold. Instead, Circular 123 sets out the procedures by which a public company shall determine its own foreign ownership ratio, which, in certain cases, is subject to further approval by the State Securities Commission (**SSC**).

As per Article 11.2 of Circular 123, a public company is responsible for defining the business investment lines and the maximum foreign ownership ratio in the company. Any public company in which the foreign ownership ratio is not restricted in accordance with Decree 60, but which wishes to limit the actual foreign ownership ratio in that company, shall be required to expressly provide such limitation in its charter.

Additionally, pursuant to Article 12 of Circular 123, public companies conducting activities that result in a change of the foreign ownership ratio must report and disclose such information, including the following cases:

- (i) the public company, in which the foreign ownership ratio was previously unrestricted, makes an adjustment to its foreign ownership ratio;
- (ii) upon registration of a public company, offer or issue of securities, the public company makes an adjustment to its foreign ownership ratio;
- (iii) upon reorganisation of a company, including division, demerger, consolidation and merger, there is an adjustment to the foreign ownership ratio;
- (iv) any change in the business investment line resulting in a change in the foreign ownership ratio;
- (v) there is a change in the provisions of an international treaty or relevant laws in relation to the foreign ownership ratio in the business investment lines in which the public company currently operates.

With respect to the cases specified in (ii) and (iii) above, the reporting procedures shall be conducted at the same time as reporting and disclosure of information upon registration of a public company or registration of an offer, issue or reorganisation of the company. In other cases, the public company shall have to submit an application dossier to the SSC. The SSC shall consult with other relevant State authorities to certify the information on the foreign ownership ratios, in the following circumstances:

- (i) if there are no business investment lines; the scope of operations in a business investment line is unclear; or there is a discrepancy between the business investment line in the licence for establishment and operation, the Business Registration Certificate or the Enterprise Registration Certificate and the business investment line in the National Business Registration Portal or the National Foreign Investment Portal or website of the relevant State agency on business investment lines; and
- (ii) the company operates in business investment lines for which Vietnam has not yet made any commitment under international treaties.

Within 10 working days from the date of receipt of the complete report and its supporting documentation (excluding any time required by the SSC to consult with other State authorities), the SSC will issue the company with a receipt for a complete report. One day after receiving this receipt, the company shall disclose information on its website, and notify the Stock Exchange and Vietnam Securities Depository (**VSD**), of the maximum foreign ownership ratio for such company. Foreign investors may conduct securities trading up to the maximum foreign ownership ratio immediately after the public company discloses information about the maximum foreign ownership ratio in the company, except in cases of registration of a public company.

Should the actual foreign ownership ratio at a public company exceed the ratio permitted in accordance with Decree 60, such company is not allowed to further increase its foreign ownership ratio in any way.

Circular 123 will come into effect as from 1 October 2015, replacing Decision 213/2012/QD-BTC of the Ministry of Finance, dated 6 December 2012.

DETAILED PROVISIONS ON BANK GUARANTEES FOR SALE AND HIRE PURCHASE OF FUTURE HOUSES

Under Law No. 66/2014/QH13, entitled the Law on Real Estate Business, passed by the National Assembly on 25 November 2014 (**Law on Real Estate Business**), the financial obligations of an investor for a real estate project for sale or hire purchase of residential houses to be formed in the future (**Future Houses**) shall be guaranteed by at least one capable commercial bank. For the purpose of clarification of such regulation, the State Bank of Vietnam (**SBV**) issued Circular No. 07/2015/TT-NHNN, on bank guarantees, dated 25 June 2015 (**Circular 07**).

Below are the key points introduced under Circular 07.

Conditions on providing guarantees to investors

A commercial bank providing a guarantee to the investor of a real estate project for the sale or hire purchase of a Future House shall comply with the following conditions:

- (i) the Future House is eligible to be sold or hire purchased in accordance with the Law on Real Estate Business;
- (ii) the contract for sale and purchase or hire purchase of a Future House signed between an investor and a purchaser or hire purchaser stipulates that the investor is obliged to reimburse the purchaser or hire purchaser if the investor is in breach of the obligation to hand over the Future House in accordance with the schedule undertaken to the purchaser or hire purchaser;
- (iii) the commercial bank assesses the investor as capable of implementation in accordance with the schedule for the project and uses advance payments or other sums paid by purchasers or hire purchasers to the investor for the correct purposes;
- (iv) the commercial bank is permitted by the SBV to carry out bank guarantee activities in its licence for establishment and operation or in any document amending its licence for establishment and operation;
- (v) the agreement issuing a guarantee signed with the investor and/or the guarantee undertaking must be consistent with the provisions of the Law on Real Estate Business; and
- (vi) the guarantee undertaking for sale or hire purchase of a Future House must be effective until a date being at least 30 days after the date of handover of residential houses to purchasers or hire purchasers of residential houses as agreed between the investor and purchasers or hire purchasers.

Contents of guarantee contract

The guarantee contract between the commercial bank and the investor shall be made in any of the forms of guarantee undertaking, including letter of guarantee and guarantee contract, and shall contain the following particulars:

- (i) applicable law;
- (ii) serial number and form of the guarantee undertaking;
- (iii) information about the parties in the guarantee relationship;
- (iv) date of issuance of the guarantee, date of commencement of effectiveness of the guarantee and/or circumstances in which effectiveness of the guarantee commences;
- (v) date of expiry of effectiveness and/or circumstances in which effectiveness of the guarantee will expire;
- (vi) amount and currency of the guarantee;
- (vii) guaranteed obligation;
- (viii) conditions for performance of the guaranteed obligation;
- (ix) request documentation for performance of the guaranteed obligation;
- (x) method to check the authenticity of the guarantee undertaking; and
- (xi) other items in conformity with the law.

Qualified commercial banks

According to an article on the Government's website dated 27 August 2015, there are 38 commercial banks qualified to provide a guarantee to the investor of a real estate project for sale or hire purchase of Future Houses.

Lack of implementing regulations

In practice, Circular 07 has raised more questions than answers as to:

- (i) whether the reimbursement by the commercial bank to the purchaser or hire purchaser also includes the penalties for breach of the obligation to hand over the Future House in accordance with the agreed schedule;
- (ii) whether the guarantee contract shall be deemed invalid due to lack of conditions on providing a guarantee to the investor;
- (iii) whether the effective period of the guaranteed obligation which lasts at least 30 days is from the proposed date of handover of residential houses to purchasers or hire purchasers, or the actual date of handover of residential houses to purchasers or hire purchasers;
- (iv) accordingly, how the interests of the purchaser or hire purchaser will be settled upon any guarantee contract being deemed invalid or the expiry of the effective period of the guaranteed obligation.

Circular 07 took effect as from 9 August 2015, and we are hopeful that such outstanding issues will be addressed by further implementing regulations in the near future.

MORE ESSENTIAL SERVICES SUBJECT TO REGISTRATION OF STANDARD CONTRACTS AND GENERAL TRADING CONDITIONS

As from 15 October 2015, there will be up to 11 essential services subject to compulsory registration of standard contracts and general trading conditions, as recently amended and supplemented under Decision No. 35/2015/QD-TTg of the Prime Minister, dated 20 August 2015 (**Decision 35**). This new legislation presents a significant development compared with the current regulations on surveillance of standard contracts and general trading conditions for consumer protection, which were initiated under the 2010 Law on Consumer Protection (**LoCP**), Decree No. 99/2010/ND-CP on implementing the LoCP (**Decree 99**) and Decision No. 02/2012/QD-TTg of the Prime Minister, dated 13 January 2012, on essential services subject to registration (**Decision 02**).

Registration of standard contracts and general trading conditions under the LoCP

As contemplated under Article 3 of the LoCP, a standard contract is defined as a contract prepared by a trader or services provider in respect of a transaction with a consumer. Conversely, general trading conditions shall not have any consumer involvement, where they are trading principles solely prepared and published by traders and services providers for consumers' awareness. The LoCP further provides for a statutory obligation of the State authorities under Article 19 with regard to the management of illegal abuse of standard contracts and general trading conditions of traders and services providers which mislead or treat consumers unfairly.

In an attempt to mitigate any injustice from the customers' perspective when entering into transactions with traders and services providers, as from 1 March 2012, nine essential services were recognised by Decision 02 with respect to compulsory registration of a standard contract and general trading conditions, including but not limited to electricity and water supply, condominium acquisitions, railway and airway transportation. The relevant authority responsible for approving such registration was identified as the Vietnam Competition Authority (**VCA**) and provincial, municipal Departments of Industry and Trade (**DoITs**) across the country.

Additional essential services

After three years of implementing Decision 02, the Ministry of Industry and Trade (**MoIT**) submitted a proposal to the Prime Minister for reconsideration of the list of essential services. The Prime Minister has made certain amendments to this list, including additions to the essential services set out in Decision 35. The additional essential services are ground-based mobile communication services (prepaid service); issuance of domestic

debit cards; opening and use of payment accounts (for individual customers); personal consumer credit loans; and life insurance.

In its proposal to the Prime Minister, the MoIT also presented the criteria for identification of an essential service to be registered with the State authorities, including:

- (i) standard contracts and general trading conditions which are commonly used in the service;
- (ii) the service serves the needs of consumers on a daily and regular basis;
- (iii) standard contracts and general trading conditions used in the service have many complicated provisions which create difficulties and restrictions for consumers; and
- (iv) there are numerous cases in practice where entitlements of consumers were infringed at the time of entering into standard contracts and general trading conditions in the service.

Following the above criteria, these additional services are well worth registering with the State authorities in the ongoing pursuit of consumer protection.

Registration obligations

Within 90 days as from the date of Decision 35 taking effect, any standard form contract and general trading conditions in terms of the above services must be registered with either the VCA for nationwide use or the local DoIT for provincial use. Failure to register may result in a monetary fine of between VND30 million and VND50 million (approximately equivalent to US\$1,300 and US\$2,200) and an additional penalty being the revocation of the business licence or compulsory suspension of up to three months. The contracts and/or conditions themselves shall also be declared invalid by the relevant courts where identified as being unregistered as required by the LoCP, Decision 02 and Decision 35.

Impact of Decision 35

Decision 35 shall take effect as from 15 October 2015. The number of affected enterprises is reported by the MoIT to be:

- (i) approximately 100 banks providing domestic debit cards, individual payment accounts, digital banking and personal consumer credit loans;
- (ii) approximately 17 insurers providing life insurance; and
- (iii) approximately 6 enterprises providing prepaid mobile communications.

While the number of enterprises under surveillance for standard contracts and general trading conditions is modest, a considerably large number of consumers shall benefit from the new legislation. For instance, there are approximately 12,000,000 life insurance consumers nationwide; and 90,000,000 mobile communication consumers. Decision 35 is expected to strengthen consumer protection in Vietnam in the coming years.

EU – VIETNAM FREE TRADE AGREEMENT

The negotiation process for a free trade agreement between the European Union (**EU**) and Vietnam was officially launched on 26 June 2012 (**EVFTA**). After 14 full rounds of negotiations, the EU and Vietnam have reached an agreement in principle on 4 August 2015. However, the legal framework has not been finalised due to technical issues. It is expected that the EVFTA will be finalised before the end of 2015.

We provide below the main contents of the EVFTA.

Elimination of customs duties

Nearly all tariffs will be removed (over 99%) by both parties, except with respect to certain sensitive agricultural products. Once in force, Vietnam will liberalise 65% of import duties on EU exports to Vietnam and the roadmap for full tax elimination is seven years for motorcycles with engines larger than 150cc, automobile parts, wine and spirits, frozen pork meat to 10 years for automobiles and chicken meat.

99.2% of EU tariff lines will be removed over a seven-year period. For some agricultural products which have not been fully liberalised, including rice, sweet corn, garlic, mushrooms, sugar and canned tuna, the EU

instead offers access to these Vietnamese exports via specified tariff rate quotas.

Intellectual Property

Vietnam will increase the level of protection for EU intellectual property (**IP**) rights, especially in the area of IP enforcement. With respect to the highly sensitive and significant sector of pharmaceuticals, a special annex has been included for such products. Vietnam has committed to permit foreign invested companies to import and sell medicine to distributors and wholesalers within the country and may grant an extension on a patent for up to two years for EU pharmaceutical products.

In addition, 169 European geographical indications (**GIs**) for food and drink products will be protected by Vietnam while the EU will recognise and protect Vietnam's 39 GIs including Moc Chau tea and Buon Ma Thuot coffee. New GIs are allowed to be supplemented in the future.

Government procurement and State-owned enterprises

Both sides have also agreed on the contents of government procurement in compliance with the Government Procurement Agreement (**GPA**) rules of the WTO, which will increase Vietnam's international credibility. EU companies are able to bid on Vietnamese public contracts invited by Vietnamese ministries, important State-owned enterprises (**SOEs**), 34 public hospitals and the Ho Chi Minh City and Hanoi municipal governments. The EU will provide technical assistance to Vietnam to implement obligations in relation to online tendering and the establishment of a website portal for tendering information.

When Vietnamese SOEs are engaged in commercial activities, the EU requires them to comply with the same rules applicable to non-State entities.

Please note that once finalised, the EVFTA will then need to be approved by the European Council and European Parliament. The EVFTA is scheduled to take effect in late 2017 or early 2018.

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