

FRASERS NEWSLETTER – JANUARY 2018

In this edition of our newsletter we report on:

- i) Several decrees introducing new import duty rates effective from 1 January 2018 for products imported from various countries having free trade agreements with Vietnam;
- ii) New decree regulating region-based minimum wage levels applicable to labourers who work under labour contracts;
- iii) Approval of certain equitisation plans for state-owned enterprises (PVPower, PVOil, EVN Genco 3);
- iv) New decree on trading activities and businesses directly related to the trading activities of foreign investors and foreign invested companies; and
- v) New decree applicable to logistics businesses.

1. Several decrees providing for new import duty rates effective from 1 January 2018 for products imported from various countries having free trade agreements with Vietnam

The government recently issued ten decrees to implement Vietnam's special preferential import tax commitments made in its free trade agreements (**FTAs**) with various partners.

Those decrees took effect from 1 January 2018 and are applicable for the period of 2018-2022, with Decrees 155/2017/ND-CP (implementing import tax rates under the Vietnam-Japan Economic Partnership Agreement) and 160/2017/ND-CP (implementing import tax rates under the ASEAN-Japan Comprehensive Economic Partnership Agreement) applicable during 2018-2023.

Decree	Relevant FTA	Applicable period
Decree No.149/2017/ND-CP	Vietnam-Korea Free Trade Agreement (VKFTA)	2018-2022
Decree No.150/2017/ND-CP	Vietnam-Eurasia Economic Union Free Trade Agreement (VN-EAEU FTA)	2018-2022
Decree No.153/2017/ND-CP	Agreement on Trade in Goods signed with the ASEAN and China	2018-2022
Decree No.154/2017/ND-CP	Vietnam-Chile Free Trade Agreement (VCFTA)	2018-2022
Decree No.155/2017/ND-CP	Vietnam-Japan Economic Partnership Agreement (VJEPA)	2018-2023

Decree	Relevant FTA	Applicable period
Decree No. 156/2017/ND-CP	ASEAN Trade in Goods Agreement (ATIGA)	2018-2022
Decree No. 157/2017/ND-CP	Agreement on Trade in Goods under the Framework Agreement on Comprehensive Economic Co-operation among the Governments of Member Countries of ASEAN and the Republic of Korea (AKFTA)	2018-2022
Decree No. 158/2017/ND-CP	Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA)	2018-2022
Decree No. 159/2017/ND-CP	ASEAN-India Trade in Goods Agreement (AIFTA)	2018-2022
Decree No. 160/2017/ND-CP	ASEAN-Japan Comprehensive Economic Partnership Agreement	2018-2023

The decrees specify the special preferential import tax rates applicable to goods imported from Vietnam's partners under the relevant FTAs.

In order to enjoy the preferential import tax rates, the imported goods must meet the following conditions:

- i) The goods must fall under the list of goods under the relevant decree and FTA;
- ii) The goods must be imported from the country partner under the relevant decree and FTA;
- iii) The goods must be transported from the country partner under the relevant decree and FTA; and
- iv) The requirement on origin of goods must be satisfied (i.e., there must be a valid certificate of origin issued by the country partner).

The import tax rates have been reduced significantly for a period of four or five years from 2018 to 2022 or 2023. There are as many as 5,535 product lines which may enjoy a 0% import tax rate under the VN-EAEU FTA. This focuses on materials required for manufacturing export products such as materials for the textile industry, leather and plastic materials.

2. New decree regulating the region-based minimum wage levels applicable to labourers who work under labour contracts

On 7 December 2017, the Government issued Decree No. 141/2017/ND-CP on region-based minimum salaries (**RMS**) applicable to employees who work under labour contracts (**Decree 141**). Decree 141 took effect from 1 January 2018.

By law, the RMS is generally the minimum monthly salary level applicable to employees who perform the simplest work which does not require any training or qualification. The RMS is divided into different categories based on the location of the employers as follows:

Region	VND/month	USD/month (approx.)
Region I	3,980,000	175
Region II	3,530,000	155
Region III	3,090,000	136
Region IV	2,760,000	121

Decree 141 specifies a list of geographic locations falling under each region. Most districts in Hanoi and Ho Chi Minh City fall within Region I.

RMS is used to determine the cap amount in calculating unemployment insurance contributions for both employers and employees. Specifically, the salary which is used to calculate the unemployment insurance contribution is capped at 20 times the RMS. An increase in RMS therefore will lead to an increase in the unemployment insurance contribution, and accordingly, an increase in labour costs borne by employers.

It should be further noted that the Government in late November 2017 also approved Decision No. 1916/QD-TTg on the State Budget Estimate for 2018, which provides for an increase in the General Minimum Salary (GMS) from VND1,300,000/month to VND1,390,000/month (approx. USD61/month) from 01 July 2018. We expect that an official decree implementing the above Decision will be issued soon.

By law, the GMS is used as the basis to determine a cap amount in calculating social and health insurance contributions for both employers and employees, and also other statutory contributions (e.g. trade union fees). Specifically, the salary used to calculate social and health insurance and trade union fee contributions is capped at 20 times the GMS. The increase of the GMS will, therefore, result in an increase in labour costs for businesses.

3. Approval of certain equitisation plans for state-owned enterprises (PVPower, PVOil, EVN Genco 3)

The Prime Minister recently issued three Decisions approving the equitisation plans of several state-owned enterprises in the oil and gas, and energy sectors.

Specifically, on 8 December 2017, Decision No. 1979/QD-TTg approving the equitisation plan for PetroVietnam Oil Corporation (**PVOil**) and Decision No. 1977/QD-TTg approving the equitisation plan for PetroVietnam Power Corporation (**PVPower**) were adopted. Later, on 27 December 2017, Decision No. 2100/QD-TTg approving the equitisation plan for Power Generation Joint Stock Corporation 3 (**EVN Genco 3**) was adopted.

These Decisions set out the details of each equitisation plan, including the form of equitisation, the charter capital of the company after equitisation, the charter capital structure after equitisation, the foreign ownership cap, the timing and starting price for the public offer, the timing, period and price for the sale to strategic investor(s), criteria for selection of strategic investor(s), and the authority responsible for the selection of strategic investor(s).

The detailed plans for the equitisation of PVOil, PVPower and EVN Genco 3 were discussed in our previous legal alert available at: [Legal Alert - Equitisation of Vietnam Oil and Gas and Energy Sectors SOEs](#).

The equitisation of state-owned enterprises is governed by Decree No. 126/2017/ND-CP dated 16 November 2017 on the equitisation of State-owned Enterprises having 100% of their equity owned by the State (Decree No. 126). As of 1 January 2018 Decree No. 126 replaced the earlier Decree No. 59/2011/ND-CP dated 18 July 2011 and all of its amendments governing the same topic (Decree No. 59). Our legal alert on Decree No. 126 is available at: [Legal Alert - New Decree on Equitisation](#).

4. New decree on trading activities and businesses directly related to trading activities of foreign investors and foreign invested companies

On 15 January 2018, the Government issued Decree 09/2018/ND-CP on the purchase and sale of goods and activities directly related to the purchase and sale of goods by enterprises with foreign owned capital in Vietnam (Decree 09), replacing Decree 23/2007/ND-CP (Decree 23). Decree 09 took effect on 15 January 2018.

Decree 09 introduces some important changes, as follows:

a) Business licence

- i) Whereas Decree 23 and its implementing circular provided that an investment certificate (**IC**) issued to a foreign investment enterprise (**FIE**) can also be a business licence enabling the company to carry out trading activities as approved in such IC, Decree 09 expressly requires a separate business licence for FIEs engaging in trading activities (**Business Licence**).
- ii) Article 5 sets out specific trading activities which are required to obtain such separate Business Licence, including:
 - Retail of goods;
 - Import and wholesale of lubricating oils and greases;
 - Provision of logistic services, except for those for which Vietnam has made commitments under treaties to which Vietnam is a member;
 - Goods leasing activities, excluding finance leasing, and excluding an operating lease for construction equipment;
 - Provision of trade promotion activities, not including advertising activities;
 - Provision of commercial intermediary activities;
 - Provision of e-commerce services; and
 - Provision of auction activities for goods and services.
- iii) FIEs engaging in trading activities other than those listed in Article 5 of Decree 09 are not required to obtain a Business Licence.
- iv) The duration of the Business Licence is five years for: investors that are not from a country which is a member of an international treaty to which Vietnam participates; or for business activities that are not bound under such international treaties; or for trading products that are not in the list of market access committed products under such international treaties. Decree 09 is silent on the duration of the Business Licence in most other cases. However we expect that the Ministry of Industry and Trade will soon issue further guidance on this point.
- v) The relevant authority for issuing the Business Licence is the provincial Department of Industry and Trade (**DOIT**) where the FIE is located.

b) Retail Outlet Licence

- i) Previously under Decree 23, a FIE was not required to hold a licence for its first retail outlet. Decree 09 now mandates that all FIEs must obtain a retail outlet licence (**Retail Outlet Licence**) when opening any retail outlets, including the first one.
- ii) Any retail outlet in addition to the first one (**the Additional Retail Outlet**) will be subject to the economic need test (**ENT**) when applying for the relevant Licence for Retail Outlet, except if such retail outlet:
 - has an area of less than 500m²;
 - is located within the premises of a commercial centre; and
 - does not fall within the definition of a convenience store or mini supermarket.
- iii) Decree 09 also provides a broader definition for Additional Retail Outlet. The

definition includes any retail outlet established in Vietnam by a foreign investor or a FIE which already has a retail outlet in Vietnam, or any retail outlet established under the same name and trademark as any other retail outlet owned by a FIE in Vietnam. According to this stricter definition, if a FIE sets up its first retail outlet but this outlet has the same name and trade mark of another retail outlet owned by another FIE, the retail outlet will be considered an Additional Retail Outlet and therefore may be subject to the ENT.

- iv) The relevant authority for issuing the Retail Outlet Licence is the provincial DOIT where the outlet is located.
- v) By way of background, under the Law on Investment, the following companies are treated as “foreign investors”:
 - Any company having foreign investors holding 51% or more of its shares or capital contribution (**F1 FIE**);
 - Any company having a F1 FIE holding 51% or more of its shares or capital contribution (**F2 FIE**); and
 - Any company having foreign investors and F1 FIE holding 51% or more of its shares or capital contribution (**F3 FIE**).

Decree 09 clearly states that after an acquisition of shares or capital contribution, if the target company becomes an F2 FIE or F3 FIE, the target company must obtain a Business Licence and the Retail Outlet Licence(s).

- vi) The Retail Outlet Licence has a duration equal to the remaining term of the project stipulated in the investment registration certificate of the relevant company. If the company does not have an investment registration certificate, the Retail Outlet Licence’s term will be in accordance with the terms specified in the documents of the retail outlet. To date, no further guidance on this point has been issued.

5. New decree on logistic business

On 30 December 2017, the Government issued Decree No.163/2017/NĐ-CP regulating the business of logistics services (**Decree 163**). Under Decree 163, logistics services are classified into 17 main types, including, among others, container loading and unloading (excluding at airports), warehouses for supporting transportation, delivery services, freight transport agency services, customs brokerage services, transportation services, etc. The classification under Decree 163 is mostly aligned with Vietnam’s schedule of specific commitments under the WTO; accordingly, it has become easier for foreign investors to cross check between Vietnamese regulations and international commitments under the WTO.

Decree 163 specifically provides that foreign investors can establish an enterprise, or contribute capital or purchase shares in an existing enterprise. However, in several sectors, such activities are still subject to foreign ownership caps and to some other strict conditions.

In general it can be considered that the foreign ownership caps under Decree 163 do not provide further market access to foreign investors as compared to what has been committed under Vietnam’s WTO commitments and as compared to the previous Decree No. 140/2007/ND-CP. Specifically, the foreign ownership caps are still at 49-50-51% for a few sectors such as marine transportation, loading containers and road transportation. Several other logistic services still require capital contribution from at least one Vietnamese partner in the company without specifying the foreign ownership cap.

In addition to the above foreign ownership caps, Decree 163 also specifies several other conditions for foreign investors. For example, for marine transport (excluding internal shipping), foreign investors can set up companies operating fleets of ships flying Vietnamese

flags, but the captain and the first deputy captain must be Vietnamese citizens, and foreign crew members must form less than one-third of the total. For road transportation, all drivers employed by foreign-invested companies must be Vietnamese citizens.

One of the most notable points under Decree 163 is that it specifically requires that logistics providers must comply with regulations on e-commerce if they provide part or whole of their logistic services through the Internet, cellular network or other open networks. Vietnam's main e-commerce regulations are provided under Decree 52/2013/ND-CP, which generally requires e-commerce service providers to, among other things, (i) either notify or register the e-commerce website with the Ministry of Industry and Trade, and (ii) protect personal information and consumer interest in accordance with Decree 52/2013/ND-CP.

In relation to limitations on the liability of logistics service providers, Decree 163 provides a general rule that parties can agree on such limitations (unless otherwise specified by a relevant law). If the parties have not made such agreement, the maximum liability of the logistics service provider shall be either (i) 500 million Vietnam Dong for each claim for compensation (if the customer failed to give prior notice of the value of the cargo), or (ii) the value of the cargo (if the customer gave prior notice of the value of the cargo and such value was verified by the logistics service provider).

Decree 163 shall take effect from 20 February 2018 and replace Decree No. 140/2007/ND-CP currently governing the same matters.

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.

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.

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