

SEPTEMBER 2018 NEWSLETTER

In this edition of our newsletter we report on the following:

- (i) New **Law on Competition** (and Draft Decision on the Implementation Schedule and Plan for the New Law on Competition);
- (ii) New Decision on **Vietnam standard industrial classification**;
- (iii) New Decree on **business registration**; and
- (iv) New Official Letter on **wholesale and retail activities**;

1 New Law on Competition

On 12 June 2018, after a number of drafts had been discussed by the lawmakers, the new Law on Competition was passed by the 14th National Assembly (**New Law on Competition**) replacing Law on Competition No. 27/2004/QH11 dated 3 December 2004 (**Law on Competition 2004**) which had been in place for almost 14 years. The New Law on Competition shall take effect as from 1 July 2019.

Below we report on the most notable provisions of the New Law on Competition which may have significant impact on enterprises in Vietnam.

- **Wider range of subjects of application**

The Law on Competition 2004 only applies to individuals and organizations operating in Vietnam.

However, in the New Law of Competition, related foreign-based individuals and organizations are also subjects of application of the law, that is, the New Law on Competition applies even to overseas transactions entered into between foreign-based entities, as long as such transactions affect or may affect the competition within the Vietnam market.

- **New prohibited agreements in restraint of competition**

Under the Law on Competition 2004 a number of competition-restraining agreements were prohibited (such as bid rigging, price fixing, customer allocation, restrictions on output, etc.).

Article 11 of the New Law on Competition now prohibits two new types of agreements when they may cause a significant restraint of competition: (i) 'agreements not to trade with parties not participating in the agreements'; and (ii) 'agreements to restrain the product sale market or sources of supply of goods and services of parties not participating in the agreements'.

The new Law on Competition also generally prohibits any other agreements which "cause or are capable of causing a significant competition-restraining impact in the Vietnam market". The relevant determination shall be made by the National Competition Committee (**NCC**) under the Ministry of Industry and Trade.

- **Mergers control by the National Competition Committee**

Under the Law on Competition 2004, merger transactions (including acquisitions, joint-ventures or other any forms of economic concentrations) resulting in the participating parties having a 'combined market share' of between 30% and 50% in any 'relevant market', required a deal-specific approval by the relevant Vietnam Competition Authority. Merger transactions resulting in the participating parties having a 'combined market share' of more than 50% in any 'relevant market' were outright prohibited.

The New Law on Competition now removes the above thresholds, and adopts a more flexible (but also vaguer) approach which prohibits merger transactions which "cause or are capable of causing a significant competition-restraining impact in the Vietnam market". The relevant determination shall be made by the NCC, taking into account a number of criteria such as: (i) total assets in the Vietnam market of the enterprises participating in the economic concentration; (ii) total turnover in the Vietnam market of the enterprises participating in the economic concentration; (iii) transaction value of the economic concentration; or (iv) combined market share in the relevant market of the enterprises participating in the economic concentration.

- **New prohibited unfair competition practices**

The New Law on Competition has prohibited a new practice on the basis that it creates unfair competition, which is the act of selling goods and services of a company below their overall cost that drives or may drive the competitors of such company out of the market. This practice is now prohibited regardless of the market share of the infringing company.

- **Indirectly comparing goods or services**

Another interesting provision that was newly introduced by the New Law on Competition is contained under Article 45.5(b), according to which an enterprise is prohibited from soliciting customers by indirectly comparing its goods or services with goods or services of the same type of another enterprise (unless it is able to prove the contents of such comparison).

- **Specification of fines for breach of the new Law on Competition**

The New Law on Competition has also provided more details with respect to the maximum fines applicable to organisations for breach of the New Law on Competition as follows: (i) a fine for breach of the provisions on economic concentration shall not exceed five per cent (5%) of the total turnover in the relevant market; (ii) a fine for breach of the provisions on

unfair competition shall not exceed VND2,000,000,000; and (iii) a fine for other breaches of the New Law on Competition shall not exceed VND200,000,000.

While the above changes can be welcomed in principle, the provisions of the New Law on Competition are still too broad and vague to be assessed, and will need to be considered in conjunction with their detailed implementing legislation. In this respect, the Prime Minister recently issued a Draft Decision on the Implementation Schedule and Plan for the New Law on Competition, according to which the Ministry of Industry and Trade shall issue the implementing legislation for the New Law on Competition within January 2019.

2 New Decision on Vietnam standard industrial classification

On 6 July 2018, the Prime Minister issued Decision No. 27/2018/QĐ-TTg providing for the new national system of economic sectors in Vietnam (i.e. Vietnam standard industrial classification) (**Decision 27**). Decision 27 was issued to replace Decision No. 10/2007/QĐ-TTg dated 23 January 2007 (**Decision 10**) and has taken effect since 20 August 2018.

Decision 27 comprises not only the updated list of codes of economic sectors in Vietnam, but also the explanation for the contents of each economic sector. In other words, content-wise, Decision 27 combines the regulations under Decision 10 and those under Decision No. 337/QĐ-BKH issued by the Ministry of Planning and Investment on 10 April 2007 (which elaborated on the contents of such sectors).

Decision 27 serves the purpose of systemizing economic sectors in Vietnam and supplementing a few sectors which were previously not covered by Decision 10.

Upon the issuance of Decision 27, any enterprises and investors in Vietnam should refer to the list provided under Decision 27 when making their business and/or investment registrations.

Pursuant to Official Letter No. 234/DKKD-NV issued by the Ministry of Planning and Investment (**MPI**) addressed to the Enterprise Registration Departments of all provincial Departments of Planning and Investment (**DPI**), for enterprises that have been issued with the enterprise registration certificate prior to 20 August 2018, they are recommended, but not required to, update their current business lines in conformity with Decision 27. Such amendments or updates (if any) can be made later when the relevant enterprises will undergo any other changes/amendments of their business registration information.

3 Decree on business registration

On 23 August 2018, the Government issued Decree No. 108/2018/NĐ-CP amending and supplementing some articles of Decree 78/2015/NĐ-CP dated 14 September 2015 on enterprise registration (**Decree 108**). Decree 108 will take effect from 10 October 2018.

Decree 108 introduces some important changes as follows:

- **Simplifications regarding the application dossiers, sequence and procedures for enterprise registration**
 - a. Enterprises are no longer required to stamp their seal on the application for enterprise registration, on the notification on change of registered information, and on resolutions, decisions, and meeting minutes;
 - b. The power of attorney necessary for the person who will conduct the procedures for the enterprise registration is no longer required to be notarised;
 - c. The charter or equivalent documents of the owner of the enterprise are no longer required to be submitted for establishment of a single-member limited liability company; and

d. The application dossier for change of the corporate form of an enterprise can be combined into the application for other changes of the enterprise information (except for the change of the legal representative of the enterprise).

- **Simplifications regarding the change of the contents of the enterprise registration**

- a. the financial statements as of the date of passing the resolution or decision for capital reduction are no longer required to be submitted in the capital reduction application; and
- b. if a resolution or decision on the change of charter capital or members was lawfully passed in accordance with the law, it is no longer necessary to obtain the signatures of all the members or shareholders on the list of members, the list of founding shareholders and the list of shareholders.

4 **New Official Letter on wholesale and retail activities**

On 7 August 2018 the Ministry of Industry and Trade of Vietnam (**MOIT**) issued Official Letter No. 6219/BCT-KH (**Official Letter 6219**), providing guidelines on the implementation of Decree No. 09/2018/ND-CP guiding the Law on Commerce and Law on Foreign Trade Management related to the sale and purchase of goods and activities directly related to the sale and purchase of goods of foreign investors and foreign-invested business entities in Vietnam (**Decree 09**).

Official Letter 6219 provides clarifications to a number of terms in Decree 09 and also guides certain contents regarding the relevant Business License and Retail Outlet License. The key points of Official Letter 6219 are listed below:

- **Further clarifications on the scope of retail and wholesale activities**

Official Letter 6129 provides further explanation on the distinction between retail and wholesale activities when the products are sold to an entity/organisation.

In particular, if a trader sells products to an entity/organisation and the purchaser uses such products merely for internal use and not for its business activities (e.g. manufacturing), that will be considered as retail activity. One example could be an organisation purchasing food or office stationery to serve the daily usage of its employees, which will thus fall under the category of 'retail'.

On the other hand, if a trader sells products to an entity/organisation and the purchaser uses such products for further wholesale, retail, or for its business (e.g. the purchase of materials to further manufacturing food or drink for sale to end-use customers), that will be considered as 'wholesale activity'.

- **Contents of Business License and Retail Outlet License**

Official Letter 6129 clarifies that under Decree 09, foreign-invested business entities are not required to list the HS Code of the goods they trade. The investor or business entity, however, can still choose to use HS Code if it is convenient for the investor or business entity to carry out customs or taxes procedures.

Official Letter 6129 further recommends Departments of Industry and Trade (**DOIT**) to follow the above regulation under Decree 09 in examining the Business License and Retail Outlet License (because in practice, some DOIT still require the specification of HS Code as a compulsory part in the licensing application for retail business).

Under the spirit of Decree 09 and Official Letter 6129, therefore, in principle traders shall not be required to specify HS Codes of their products in their Business License. Although

from a legal perspective this seems to be a positive change, from a practical perspective, we are concerned that without unanimous application by customs authorities, this movement may not practically be useful for traders. We understand that currently most customs authorities tend to ask for the list of retail goods specified with HS Code under the Business License of the traders for customs clearance purposes when such traders import goods from overseas.

Therefore, despite Decree 09 and the explanation under Official Letter 6129, we still strongly recommend that foreign-invested business entities should use HS Codes in the list of retail goods at the licensing stage even though this is now, according to the interpretation of the MOIT, optional.

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.

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