

FRASERS NEWSLETTER - MARCH 2019

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

- (i) New Circular on capital contribution or share purchase of **credit institutions**;
- (ii) New Circular on development of **rooftop solar power projects** in Vietnam; and
- (iii) Draft Law amending certain provisions of the **Law on Investment** and **Law on Enterprises**.

1 **New Circular No. 51/2018/TT-NHNN regulating the conditions, application, order and procedures for a credit institution to make a capital contribution or to purchase shares**

On 31 December 2018 the State Bank of Vietnam (**SBV**) issued Circular No. 51/2018/TT-NHNN (**Circular 51**) regulating the conditions, application, order and procedures for a credit institution to make a capital contribution or to purchase shares. Below are some highlights of the key provisions under Circular 51:

(i) **Transactions requiring SBV consent**

Commercial banks and finance companies (hereinafter both abbreviated as **Credit Institutions**) need to apply for the consent of the SBV in order to make capital contributions or to purchase shares in entities operating in certain sensitive sectors. In particular the SBV consent is necessary for:

- A commercial bank contributing capital to or purchasing shares in order to establish or acquire a domestic subsidiary or affiliated company operating in the following sectors: securities underwriting or securities brokerage, management and distribution of securities investment funds, management of securities investment portfolios and purchase of shares, insurance, debt management and asset exploitation, remittances, forex and gold trading, intermediary payment services or credit information;
- A commercial bank contributing capital to or purchasing shares in order to acquire a domestic subsidiary or affiliated company operating in the following sectors: finance leasing, factoring, consumer credit or credit card issuance;
- A commercial bank contributing capital to or purchasing shares in another domestic enterprise operating outside the sectors of insurance, securities, remittances, forex trading, gold trading, factoring, credit card issuance, consumer credit, intermediary payment services or credit information;
- A finance company contributing capital or purchasing shares in order to establish or acquire a domestic subsidiary or affiliated company operating in the following sectors: insurance, securities, debt management and asset exploitation;

- A commercial bank or finance company converting debts into a capital contribution in a domestic enterprise operating outside the sectors of insurance, securities, remittances, forex trading, gold trading, factoring, credit card issuance, consumer credit, payment intermediary services or credit information in order to settle bad debts.

Circular 51 does not apply to commercial banks' contributing capital or purchasing shares in order to establish a Credit Institution.

(ii) Timeline for obtaining the SBV consent

The Banking Supervisory Agency (**BSA**)¹ shall review the application, seek the opinions of the relevant authorities, and submit its opinion to the SBV within 31 days after receiving a completed and valid application dossier.

Afterwards, the SBV, within 45 days since the date receiving a completed and valid application dossier, shall provide its written consent to the capital contribution or share purchase (or shall specify the reasons why the consent is not granted)

The Credit Institution must complete the capital contribution, share purchase or conversion of debt into capital contribution, within 12 months after receiving the written consent from the SBV. After this time, the consent of the SBV shall not longer be effective, and must be re-obtained.

2 New Circular on development of rooftop solar power projects in Vietnam

On 11 March 2019 the Ministry of Industry and Trade (**MOIT**) issued Circular No. 05/2019/TT-BCT (**Circular 05**) to amend some articles of Circular No. 16/2017/TT-BCT, dated 12 September 2017, of the MOIT providing for the development and model power purchase agreement (**PPA**) of solar power projects in Vietnam (**Circular 16**). Circular 05 will come into effect as from 25 April 2019.

The most remarkable point provided in Circular 05 is the guidance on the price for purchasing and selling electricity with respect to rooftop solar power projects. In particular:

- Prior to 1 January 2018, the purchasing price of electricity (VAT exclusive) shall be VND2,086/kWh (equivalent to U.S.cents9.35/kWh, according to the central exchange rate of VND over USD quoted by the State Bank of Vietnam on 10 April 2017, which is VND22,316/USD).
- As from 1 January 2018, the above-mentioned purchasing price shall be adjusted according to the central exchange rate of VND over USD quoted by the State Bank of Vietnam on the last working day of the previous year.

In addition, Circular 05 has amended and supplemented some articles of the model PPA for rooftop solar power projects. The new amended version of the model PPA for rooftop solar power projects now includes the following provisions:

- (i) Electricity for sale;
- (ii) Price of purchasing and selling electricity;
- (iii) Confirmation on meter readings, power on grid and billing;
- (iv) Payment;
- (v) Rights and obligations of the parties;
- (vi) Other agreements; and
- (vii) Implementation provisions.

In accordance with the revised version of the model PPA for rooftop solar power projects, the electricity payment for purchasing electricity shall be made within 07 (seven) working days after (i) the parties agree on meter readings, power on grid and billing figures and (ii) the seller submits the relevant payment documents to the purchaser. Otherwise, the purchaser shall be subject to late payment interests which are equivalent to the average interest of inter-banking for 1 month term.

The PPA for rooftop solar power projects will become effective as from its execution date, and will be valid for 20 years as from the signing date (unless the term of PPA is extended or the PPA is terminated prior its term).

¹ BSA is an authority directly managed by the SBV.

3 Draft Law amending certain provisions of the Law on Investment and Law on Enterprises (4 March 2019)

On 4 March 2019, the Ministry of Planning and Investment (*MPI*) published for public comments the second draft (*Draft Law*) of the law amending certain provisions of the Law on Investment (*LOI*) and of the Law on Enterprises (*LOE*). Some of the key provisions contained in the Draft Law include:

3.1 PROPOSED AMENDMENTS TO THE LAW ON INVESTMENT:

(i) Updates to the list of conditional business sectors

- The Draft Law eliminates 17 business lines from the list of conditional business sectors (such as logistics services, hotel lodging services, and franchise) and amends 6 other conditional business lines as well as adding 2 new business lines into the list.
- Further, the Draft Law also clarifies the mechanism for any amendment to the list of conditional business sectors. Specifically, it requires that ministries who aim to propose any amendment or supplementation to the law related to the conditional business sectors must first obtain the positive opinion of the MPI (Article 8.3 of the LOI, as amended by the Draft Law).

(ii) Clarifying the terms “business investment conditions” and “investment conditions in respect of foreign investors”

- During the course of application of the current LOI, it was unclear whether the term “investment conditions in respect of foreign investors”, which is used in the context of M&A Approval (as defined below), falls within the scope of the “business investment conditions” which were provided in Annex 4 of the LOI.
- The Draft Law has now provided new definitions to distinguish such two terms, and it makes clear that:
 - ◇ “business investment conditions” are the conditions applicable to all economic organisations engaging in the business activities falling within the list of conditional business sectors; whereas
 - ◇ “investment conditions in respect of foreign investors” refer to conditions on foreign ownership restrictions, form of investment, scope of investment and conditions of Vietnamese partners.

(iii) Updates to the list of sectors receiving investment incentives

- The Draft Law adds some new sectors (such as university education, production and business activities by science and technology enterprises with respect to products formed from the results of science and technology) into the list of preferential investment industries entitled to receive investment incentives (Article 16.1(a), (i) of the LOI, as amended by the Draft Law);
- The Draft Law also removes the investment projects for construction of commercial residential housing from the list of preferential investment industries entitled to receive investment incentives (Article 15.4(a) of the LOI, as amended by the Draft Law); and
- In addition, the Draft Law amends Article 15.4 of the LOI and clarifies the provisions on the application of investment incentives in order to ensure the efficiency of this policy. For example, the investment incentives are only applicable for a specific period on the basis of the results of the project implementation. In the event that an investment project satisfies the conditions for different levels of investment incentives, such project will enjoy the highest level of investment incentive to which it is entitled.

(iv) Narrow the scope of investment projects required to obtain investment policy approval from the Prime Minister (*PM*)

- According to the Draft Law, the determination of which projects need to obtain investment policy approval from the PM will no longer be based solely on the scale of the investment capital (Article 31 of the LOI, as amended by the Draft Law); and

- The Draft Law also assigns to the provincial people's committee the authority to grant the investment policy approval with respect to some projects (i.e. construction and commercial operation of golf courses projects and some residential housing projects in urban areas) which comply with the relevant master plan (Article 31.4 of the LOI, as amended by the Draft Law).

(v) Further clarifications on situations requiring M&A Approval

In some circumstances, under the current LOI, the foreign investor is required to obtain the "Notice of satisfaction of investment conditions in the case of capital contribution, purchase of shares or acquisition of portion of capital contribution by foreign investor(s)" from the relevant authority (**M&A Approval**) when contributing capital to, or purchasing shares or charter capital of, economic organisations in Vietnam (**M&A Transaction**). In particular, the M&A Approval is required in two circumstances:

- when the target economic organisation operates in the industries or trades in which business investment is conditional in respect of foreign investors; and
- when the capital contribution or purchase of shares results in the fact that the foreign investor or deemed foreign investor holds 51% or more of the charter capital of the economic organization in the cases of:
 - ◇ increase of such charter capital ownership ratio by foreign investors from below 51% to 51% or more; or
 - ◇ increase of such charter capital ownership ratio by foreign investors from their current 51% to higher than 51%.

The Draft Law amends Article 26 of the LOI and lists out a number of situations where the M&A Approval is required prior to the change of members or shareholders of such target economic organisations. Some notable changes to this Article include:

- Obviating the need for M&A Approval if the M&A Transaction does not result in an increase of the level of foreign investors' ownership ratio in the target economic organisation, even if such target economic organisation operates in the industries or trades in which business investment is conditional in respect of foreign investors.
- Requiring foreign investors to obtain an M&A Approval when conducting M&A Transactions which use land in some areas that affect national defence and security; and

Further, Article 26.2 of the LOI is amended to emphasise that the law on securities will prevail in governing the conditions and procedures for contributing capital, purchasing and selling shares in a public company, as well as the ownership ratio cap applicable to foreign investors in a public company.

(vi) Amendments of provisions on offshore investment activities

- The circumstances where the Offshore Investment Registration Certificate (**Offshore IRC**) is required are narrowed down by the amended Article 61.1; and
- A new Article 52a is added to provide the list of industries and sectors in which offshore investment is prohibited or conditional.

3.2 PROPOSED AMENDMENTS TO THE LAW ON ENTERPRISES:

(i) Application of the Law on Enterprises and specialised laws

Article 3 of the LOE is amended to emphasise that all cases of enterprise registration need to follow the order and procedures prescribed in the LOE. Specialised law only prevail with respect to particular provisions on establishment, organisation, reorganisation, dissolution and operation of enterprises engaged in specific sectors.

(ii) Elimination of outdated and unnecessary procedures

In accordance with the Draft Law, enterprises will no longer be required to:

- Notify the business registration office of the sample seal before use (Article 44.2 and 44.5 of the LOE, as repealed by the Draft Law);

- Report the change of information about managers of the enterprise (Article 12 of the LOE, as repealed by the Draft Law);
- Recruit director or general director having professional qualifications and experience in business administration (Articles 65.2 and 81.3(b) of the LOE, as repealed by the Draft Law); and
- Comply with a standard form when appointing an authorised representative to attend the General Meeting of Shareholders (Article 139.3(c) of the LOE, as repealed by the Draft Law).

(iii) **Amendments on the definition of state-owned enterprises**

Whereas the current LOE defines the term “State-owned enterprises” as being the enterprises in which the State holds 100% charter capital, the Draft Law amends such definition to the extent that “State-owned enterprises” are “[e]nterprises in which the State holds 100% charter capital or **a majority of shares/capital contribution**”. Such amendment is to make the defined term of “State-owned enterprises” being consistent with other current legislation relating to enterprises having State ownership.

Amendments on the requirements of enterprise governance

In order to enhance the efficiency and autonomy of the enterprises, the Draft Law proposes to:

- Remove the requirements on the minimum time of share ownership in order for the shareholders to exercise some of their rights (Articles 149.4 and 161.1 of the LOE, as amended by the Draft Law);
- Amend and clarify the provisions relating to enterprises organisation, operation and administration (Articles 13.2, 78.4, 90.2, 105.1, 114.2, 134.1(b) and 163.2 of the LOE, as amended by the Draft Law); and
- Allow an enterprise to split or separate pursuant to a decision of the enterprise, instead of following the methods currently prescribed by law (Articles 192.1(d) and 193.2(d) of the LOE, as amended by the Draft Law).

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.

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.