

NEW REGULATIONS ON FOREIGN OWNERSHIP RATIOS IN VIETNAM SECURITIES MARKET – A CONDITIONAL REMOVAL OF FOREIGN OWNERSHIP LIMITATIONS

The Government of Vietnam has just officially issued Decree No. 60/2015/ND-CP (**Decree 60**), on 26 June 2015, amending and supplementing a number of articles of Decree No. 58/2012/ND-CP of the Government, dated 20 July 2012 (**Decree 58**), with respect to detailed guidelines for the implementation of a number of articles of the Law on Securities¹. In this article, we are going to present a very significant amendment, as set out in Decree 60, in relation to new regulations on foreign ownership ratios in Vietnam's securities market.

Clarification of definition of “foreign investor” and “foreign ownership ratio”

The concept of “foreign investor” when it comes to Vietnam's securities market has been further clarified since there is a definition of “foreign investor” contained in Decree 60. The realm of the “foreign investor” definition under Decree 60 is completely identical to the definition of “foreign investor” provided under the New Law on Investment². In particular, according to Article 1.1 of Decree 60, foreign investor includes:

- (i) an individual having foreign citizenship;
- (ii) an organisation established in accordance with foreign laws and conducting investment and business in Vietnam.

¹ Law No. 70/2006/QH11 on Securities passed by the Legislature XI of the National Assembly of the Socialist Republic of Vietnam at its 9th session on 26 June 2006, as amended by Law No. 62/2010/QH 12 dated 24 November 2010.

² Law No. 67/2014/QH13 on Investment passed by the Legislature XIII of the National Assembly of the Socialist Republic of Vietnam at its 8th session on 26 November 2014 (**Law on Investment**).

Furthermore, the definition of “maximum foreign ownership ratio” is now replaced by a definition of “foreign ownership ratio”. As per Article 1.1 of Decree 60, foreign ownership ratio means the total ownership of voting shares or voting capital contribution of:

- all foreign investors; and
- all economic organisations in which a foreign investor holds at least 51% of the charter capital, in a public company, a securities business company or a securities investment fund. This means that the calculation of the foreign ownership ratio is based on voting capital only, which is consistent with the principal set out in Article 4.27 of the Law on Enterprises³.

New foreign ownership ratios in Vietnam’s securities market

Article 2 of Decree 60 sets out in detail the foreign ownership ratio in the securities market of Vietnam.

There is a point worth taking into account that the foreign ownership ratio regulations under Decree 60 are applicable to (i) not only foreign investors, (ii) but also economic organisations in which a foreign investor holds at least 51% of the charter capital (hereinafter together referred to as “**Foreign Investors**”).

In particular, the foreign ownership ratio applicable to a public company shall be as follows:

- (a) In case where any international treaty to which Vietnam is a member provides for a foreign ownership ratio, it shall be in conformity with such international treaties.
- (b) With respect to a public company conducting business activities which are subject to a foreign ownership ratio by investment laws, and other relevant laws, the foreign ownership ratio in such public company shall be in conformity with the applicable laws.
- (c) With respect to a public company conducting business activities which are conditional for foreign investors, and in which there is no specific provision on the foreign ownership ratio, the foreign ownership ratio shall be 49% of the voting capital.
- (d) With respect to a public company conducting different business activities in which foreign ownership ratios have been provided differently, the foreign ownership ratio shall not exceed the minimum ratio specified in relation to the business activities which such company is conducting, unless otherwise stipulated in any applicable international treaty.
- (e) With respect to a public company which is not subject to paragraphs (a), (b), (c) and (d) above, the foreign ownership ratio shall be unlimited, unless otherwise provided in the charter of such company.

3 Law No. 68/2014/QH13 on Enterprises passed by the Legislature XIII of the National Assembly of the Socialist Republic of Vietnam at its 8th session on 26 November 2014 (*Law on Enterprises*).

Steps for determining foreign ownership ratios in a company

This means that, in order to identify the foreign ownership ratio in a targeted public company, **Company A**, we need to verify:

Step 1: Whether or not the permitted scope of business activities of Company A includes any business activities for which the foreign ownership ratio of such business activities is included within any international treaty to which Vietnam is a member (e.g. Vietnam's Commitments in the context of its accession to the World Trade Organisation) in accordance with Article 2a.1(a) of Decree 58 (as amended by Article 2 of Decree 60).

If the answer is "yes", then the specific foreign ownership ratio provided in such international treaty needs to be identified.

If the answer is "no" (i.e. such business activities are not included in any foreign ownership ratio under any applicable international treaty), then please proceed to Step 2.

Step 2: Whether or not the remaining permitted scope of business activities of Company A includes any business activities for which the foreign ownership ratio of such business activities is provided for under the investment laws, and other relevant laws of Vietnam in accordance with Article 2a.1(b) of Decree 58 (as amended by Article 2 of Decree 60).

If the answer is "yes", the percentages of all applicable ratios under the laws of Vietnam need to be identified.

If the answer is "no" (i.e. such business activities are not included in any foreign ownership ratio provided for under the investment law and other relevant laws of Vietnam), then please go to Step 3.

Step 3: Whether or not the remaining permitted scope of business activities of Company A includes any business activities which are conditional to foreign investors under the laws of Vietnam in accordance with Article 2a.1(b) of Decree 58 (as amended by Article 2 of Decree 60).

If the answer to the above question is "yes", the maximum foreign ownership ratio applicable to the relevant business activities shall be 49% of the voting capital of Company A.

If the answer to any remaining business activities is "no", Company A is not undertaking any business activities which are conditional to foreign investors under the laws of Vietnam, then, pursuant to Article 2a.1(d) of Decree 58 (as amended by Article 2 of Decree 60), the Foreign Investors would be permitted to hold charter capital of a public company without limitation, unless otherwise provided in the charter of such company.

Currently, there is no regulation which expressly provides a list of "business activities which are conditional to foreign investors" under the laws of Vietnam. For your information, Appendix 4 of the New Law on Investment provides a list of conditional business lines (***the List of Conditional Business Lines***), which we understand are applicable to both foreign investors and domestic investors. Assuming that our understanding is correct, we would like to note that the List of Conditional Business Lines consists of 267 business lines, which cover most of the common business lines registered to be undertaken in practice.

Interpretation of Foreign Ownership Limits by State Securities Commission

To address the issue of whether or not the List of Conditional Business Lines can be referred to in consideration of the foreign ownership cap in Step 3 above, in an interview with the *Vietnam Investment Review* published on 6 July 2015, State Securities Commission (**SSC**) Vice Chairman Nguyen Thanh Long (**Mr. Long**), who was directly involved in the drafting of Decree 60, stated that since a list of conditional business and investment sectors (**List of Business Activities subject to Foreign Ownership Cap**) has not yet been issued in accordance with Decree 60, the current maximum foreign ownership of 49 per cent will be temporarily applicable in all of the conditional sectors which do not have any specifically regulated foreign ownership limit. Once such List of Business Activities subject to Foreign Ownership Cap is officially released with details on the conditional sectors where foreign investors can invest above the 49 per cent threshold, Decree 60 will fully take effect, according to Mr. Long.

Moreover, in another interview with the *Vietnam Financial Times* published on 3 July 2015, Mr. Long further added that the Ministry of Planning and Investment (**MPI**) is reviewing the investment conditions for 267 business lines under the List of Conditional Business Lines and confirmed that not all of these 267 business lines are subject to the foreign ownership cap of 49% under Step 3 above and the MPI will, based upon its review of the List of Conditional Business Lines and other relevant legislation, soon issue the List of Business Activities subject to the Foreign Ownership Cap for the implementation of Decree 60. Currently, under Official Letter 1953/BKHDT-DTNN dated 7 April 2015 of the MPI to other relevant ministries, the MPI, on behalf of the Prime Minister, has finished and sent to other relevant ministries for their review and comments on the first draft of the appendix proposed to be attached to the draft decree implementing the Law on Investment providing not only the List of Business Activities subject to the Foreign Ownership Cap, but also other business conditions applicable to foreign investors. Pursuant to such first draft, there are approximately 149 business lines among the 267 business lines under the List of Conditional Business Lines silent on the foreign ownership cap.

We believe that, with the pressure of implementing Decree 60, the MPI will soon issue the List of Business Activities subject to the Foreign Ownership Cap.

Foreign Ownership Limit where different business activities undertaken

Please note that where Company A conducts different business activities in which foreign ownership ratios have been provided differently, the foreign ownership ratio which is applicable to such Company A shall not exceed the minimum ratio specified in relation to the business lines which such company is conducting, unless otherwise stipulated in any applicable international treaty.

The above steps can be illustrated in the following chart:

Article 2a.1(a) of Decree 58 (as amended by Article 2 of Decree 60) criteria

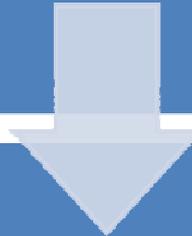
International Treaties

(e.g. WTO Commitments, ASEAN Comprehensive Investment Agreement (ACIA), Japan-Viet Nam Economic Partnership Agreement)

- Foreign ownership cap can be up to 100% in certain specific business activities referred to in these international treaties.

e.g. Foreign ownership cap:

- 1) Advertising services: up to less than 100%
- 2) Services incidental to manufacturing: up to 100%;
- 3) Courier Services: up to 100%;
- 4) Storage and warehouse services: up to 100%



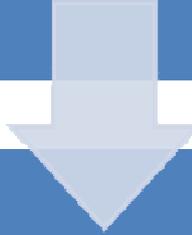
Article 2a.1(b) of Decree 58 (as amended by Article 2 of Decree 60) criteria

Domestic legislation

- Foreign ownership cap can be up to 100% provided that it is expressly provided in a specific domestic legislation

e.g. Foreign ownership cap:

- 1) storage and warehouse services: up to 100%;
- 2) Freight transport agency services: up to 100%;
- 3) Travelling services: up to less than 100%



Article 2a.1(b) of Decree 58 (as amended by Article 2 of Decree 60) criteria

List of business activities which are conditional for foreign investors

- Not yet issued
- Foreign ownership cap is 49%



Article 2a.1(d) of Decree 58 (as amended by Article 2 of Decree 60) criteria

Other business activities:

Charter to provide the specific foreign ownership cap (which can be up to 100%)

Conclusion

Prior to the issuance of Decree 60, in accordance with Decision No. 55/2009/QĐ-TTg of the Prime Minister, dated 15 April 2009, the foreign ownership ratio was set at 49% of the total number of shares in a public company. Following Decree 60, we understand there will be more room for foreign investors to invest in securities on the securities market.

In light of the above provisions, that the Foreign Investors may invest more than 49%, or even up to 100%, of voting shares of a public company, in cases where the registered scope of business activities of such public company involves business lines in which the laws of Vietnam or Vietnam's Commitments in the content of its accession to the World Trade Organisation (**WTO Commitments**) (or other applicable international treaties, as the case may be) expressly allows foreign investors to do so. More than that, where a public company conducts business lines which are not conditional to foreign investors, and in which there is no specific provision on the foreign ownership ratio, it appears that the foreign ownership limitation applicable to public companies is removed.

However, the removal of foreign ownership limitation applicable to Foreign Investors in terms of securities under the Decree 60 is conditional. As per item (c) above, the limitation of 49% of the voting shares of a public company still exists, which is applicable to any public company conducting any business line which is conditional to foreign investors, and in which the foreign ownership ratio is not specified by the laws of Vietnam and international treaties. Moreover, Foreign Investors need to consider whether or not they can take full advantage of new foreign ownership regulations under Decree 60. Furthermore, under the WTO Commitments, with respect to foreign investment into certain business lines such as telecommunication services, audio visual services or transportation, the limitation of 49% is still applicable.

As regards non-voting shares issued by public companies, Foreign Investors are allowed to invest in non-voting shares without any limitation. Moreover, Article 2.4 of Decree 60 also clearly stipulates that, unless otherwise stipulated in the charter of the issuing organisations, in the case of investment into fund certificates of securities investment funds, shares of securities investment companies, derivative securities and deposit certificates, Foreign Investors shall not be subject to any ownership restrictions. With respect to securities investment funds, except for open ended funds, in which the foreign ownership ratio is at least 51%, whenever they contribute capital to, or purchase securities or capital contributions of any economic organisation, they shall have to comply with the investment conditions and procedures applicable to foreign investors.

Decree 60 will come into full effect as from 1 September 2015.

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