

FRASERS NEWSLETTER

In this edition of our newsletter we report on:

- (i) new regulations with respect to divestment of State capital in State-owned enterprises;
- (ii) new regulations on offshore investment;
- (iii) a new decree on the inspection and evaluation of investment projects; and
- (iv) a new decree on the policies applicable to female employees

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.

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NEW REGULATIONS WITH RESPECT TO DIVESTMENT OF STATE CAPITAL IN STATE OWNED ENTERPRISES

The year 2015 is the last year for implementation of the "Proposal for Restructuring State Owned Enterprises, Focusing on Economic Groups and State Owned Corporations in the period 2011 to 2015", which was approved by the Prime Minister on 17 July 2012 (*the Proposal*). In a discussion published on the website of the Ministry of Finance, Mr Tran Van Hien, Vice Director of the Enterprise Finance Division under the Ministry of Finance, announced that during the period 2014 to 2015, state owned corporations shall have to divest more than VND25,000 billion (approximately US\$1.13 billion) of state capital in order to achieve the relevant target set forth in the Proposal. Until

August 2015, however, only VND8,000 billion (approximately US\$360 million) of state capital had been divested. As such, the amount of state capital which needs to be divested before the end of 2015 is approximately VND17,000 billion (approximately US\$770 million)¹. Decision No. 2344/QD-TTg of the Prime Minister, dated 2 December 2013 (**Decision 2344**), provides a list of 376 enterprises in which state capital held by State Capital Investment Corporation (**SCIC**) shall be fully transferred by the end of 2015, including Vinaconex, Bao Viet Corporation, FPT Corporation, Domesco Medical Import Export Joint Stock Corporation. In order to comply with Decision 2344, within the last nine months of 2015, SCIC will have to sell all of its capital in the other 217 enterprises, which would mean there would be nearly one enterprise divested per day.

For the purpose of accelerating the process of restructuring state owned enterprises (**SOEs**), the Government of Vietnam issued Resolutions No. 40/NQ-CP, dated 1 June 2015, recommending the method of shares sales by lots to divest state capital in SOEs. In accordance with such recommendations of the Government, the Prime Minister issued Decision No. 41/2015/QD-TTg, dated 15 September 2015, providing guidelines and procedures for the sale of shares by lots (**Decision 41**).

According to Article 3.1 of Decision 41, the sale of shares by lots means selling a shareholding in a shareholding company by way of a public and transparent sale to investors where each investor must register to purchase the entire number of shares offered for sale in the lot. The sale of a share lot is applicable to the divestment of state capital invested in joint stock companies, which:

- (i) has been equitised;
- (ii) has not yet listed on the Hanoi Stock Exchange (**HSE**) or Ho Chi Minh City Stock Exchange (**HOSE**), or registered for trading on the Unlisted Public Company Market (**UPCoM**); or
- (iii) is categorised in the group of SOEs in which state capital shall be divested.

The procedures for the sale of share lots shall be as follows:

- (i) first, the sale of share lots shall be conducted by auction, which must comply with the following regulations:
 - (a) it must be conducted via the HSE or HOSE on the basis of a selling plan, which has been approved by the authorised management authority of the company (**the Approved Plan**);
 - (b) the sale of share lots may be divided into a number of different lots for the auction depending on the number of shares and the relevant market status, but each auction session must only sell the whole of one specific lot, in which the number of shares must not be less than 5% of the charter capital of the company;
 - (c) it shall be exempted from making a public offer as provided in the securities laws; and
 - (d) the winning investor will be the investor who offers the highest bid.
- (ii) second, where a number of investors offer the same bid for one lot, then a competitive quotation shall be held in the form of a secret ballot between such investors with the starting price being such previous highest bid, and then the investor who puts in the highest bid shall be the winning investor;

¹ Ministry of Finance website, "Acceleration of divestment in order and transparency", http://www.mof.gov.vn/portal/page/portal/mof_vn/1539781?pers_id=2177092&item_id=183594858&p_details=1

- (iii) third, it will be permitted to sell shares by direct agreement with the investor in the following cases: (a) there is only one investor registering to purchase shares; (b) the competitive quotation has been unsuccessful; or (c) approval in writing by the Prime Minister has been received.

Both domestic investors and foreign investors are eligible to purchase shares sold in lots without any limitation of ownership, unless international treaties to which Vietnam is a member or the laws of Vietnam otherwise stipulate any caps for foreign investment ratios applicable to any specific business activities. The investors must satisfy the following criteria:

- (i) have the necessary financial capability;
- (ii) provide undertakings with respect to their long-term interests associated with the company;
- (iii) maintain a plan to continue employing the current employees;
- (iv) assist the company with the following: (a) expansion of its market; (b) improving financial and corporate governance capabilities; (c) transfer and application of new technology; and (d) manpower training; and
- (v) improve the productivity and competitive strength of the company.

The specific criteria for the investors participating in an auction of share lots shall be included in the Approved Plan. Where any investor fails to fulfil its responsibilities regarding long-term interest and assistance to the company on the principle of complying with the criteria for selection of investors participating in such sale, and the company suffers any losses and/or damages, the investor must pay compensation in accordance with the applicable laws. It should also be noted that any monetary deposit for the purchase of shares shall be non-refundable in case a successful winner refuses to make the payment for the share purchase.

NEW REGULATIONS ON OFFSHORE INVESTMENT

In order to provide guidance on the regulations in relation to offshore investments under Law No. 67/2014/QH13, entitled the Law on Investment, passed by the National Assembly at its Eighth Session on 26 November 2014 (*the New Law on Investment*), the Government of Vietnam issued and gave immediate effect to Decree No. 83/2015/ND-CP, dated 25 September 2015, on offshore investment (**Decree 83**), replacing Decree No. 78/2006/ND-CP, on offshore investment (**Decree 78**).

Governing scope

Similar to Decree 78, Decree 83 applies to offshore investment activities for commercial purposes, excluding the petroleum sector.

Decree 83 expressly provides that offshore investment activities in the form of purchases or sales of securities or other valuable papers or investments via securities investment funds or other intermediary financial institutions in a foreign country shall be stipulated in another decree to be issued by the Government at a later date.

With respect to other investment forms in accordance with the laws on investment of the recipient country, which Vietnam's legislation has not regulated, the Prime Minister of Vietnam shall consider the opinion of the Ministry of Planning and Investment on a case-by-case basis and make a decision accordingly.

Offshore investment capital

Under Decree 83, more forms of offshore investment capital are permitted, and now include the following forms:

- (i) foreign currency - in an account at a licensed credit institution or is purchased at a licensed credit institution or foreign exchange from other legitimate sources;
- (ii) Vietnamese dong (**VND**) - in accordance with Vietnam's regulations on foreign exchange control;
- (iii) machinery and equipment, materials, raw materials, fuel, finished or semi-finished products;
- (iv) value of industrial property rights, technical know-how, technological processes and technical services, intellectual property, brand name; and
- (v) other legitimate assets.

Remittance of investment capital overseas

The New Law on Investment and Decree 83 reiterate the regulations of Decree 78 in relation to the conditions by which investors may remit their investment capital overseas, as follows:

- (i) investment capital has been issued with an Offshore Investment Registration Certificate (**Offshore IRC**);
- (ii) the investment project has been approved or licensed by the relevant State authorities of the investment recipient country; and
- (iii) the investor has opened a capital account for its offshore investment.

In addition, Decree 83 supplements a new regulation on the remittance of foreign currency, goods, machinery and equipment overseas before the issuance of the Offshore IRC, in order to conduct the activities associated with the preparation of an investment. In particular:

- (i) market research and research into investment opportunities;
 - (ii) location survey;
 - (iii) research of documents;
 - (iv) collection and purchase of documents and information in relation to the selection of an investment project;
 - (v) collection, evaluation, assessment, including the selection and hiring of consultants for the evaluation and assessment of an investment project;
 - (vi) organisation of scientific workshops and conferences;
 - (vii) organisation and operation of an office as a contact point overseas in relation the preparation of an investment project;
 - (viii) participation in international bidding, deposit, escrow or other forms of financial guarantees, payment of fees and charges upon the request of the tenderer, investment recipient country or territory in relation to the conditions for participating in the bidding or conditions on implementing an investment project;
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- (ix) mergers and acquisitions of a company, deposit, escrow or other forms of financial guarantees, payment of fees and charges upon the request of the seller or regulations of the investment recipient country or territory in relation to the conditions for participating in the bidding or conditions on implementing an investment project;
- (x) negotiation of a contract;
- (xi) purchase or lease of assets for preparation of an investment project.

Please note that the threshold for remittance of investment capital overseas for preparation activities as referred to above shall not exceed 5% of the total offshore investment capital and shall be capped at US\$300,000, and shall be included in the total offshore investment capital.

Approval in-principle

The New Law on Investment and Decree 83 provide for the circumstances under which investment projects shall be subject to approval in-principle of the Government as follows:

- (i) projects in the banking, insurance, securities, press, broadcasting, television or telecommunications sectors having offshore investment capital of VND400 billion (i.e. approximately US\$18 million) or more; and
- (ii) other investment projects having offshore investment capital of VND800 billion (i.e. approximately US\$36 million) or more.

In addition, a new regulation as compared to the previous Decree 78 is that investment projects shall be subject to approval in-principle of the National Assembly in the following circumstances:

- (i) projects with offshore investment capital of VND20,000 billion (i.e. approximately US\$900 million) or more; and
- (ii) projects which require the application of a special mechanism or policy which should be decided by the National Assembly.

Online registration

Decree 82 introduces a new regulation on the compulsory online registration of offshore investment projects on the National Business Registration Portal (at <http://dautunuocngoai.gov.vn> or <http://fdi.gov.vn>).

Accordingly, upon receipt of an online registration code, an investor shall submit a hard copy of the application dossier to the relevant State authorities within 15 days as from the date of online registration. The investor, subsequently, shall be issued with a temporary account to access and monitor the application dossier.

Subsequent to the issuance of the Offshore IRC or the amended Offshore IRC, investors shall obtain an official account to conduct reporting obligations.

Termination of investment project

Under the New Law on Investment, the circumstances under which an investment project shall be terminated are similar to those cases for terminating the validity of an Investment Certificate under Decree 78.

Notably, a new regulation introduced under Decree 83 in relation to the termination of an investment project due to the transfer overseas to the foreign investor of the entire investment capital now requires the investor to notify the State Bank of Vietnam prior to termination of the project and transfer of the entire investment capital overseas.

NEW DECREE ON INSPECTION AND EVALUATION OF INVESTMENT PROJECTS

The Government of Vietnam has introduced a new decree on investment supervision and evaluation. Decree 84/2015/ND-CP dated 30 September 2015 (**Decree 84**), replaces Decree 113/2009/ND-CP, dated 15 December 2009 (**Decree 113**), and introduces a substantial number of new provisions aimed at facilitating the effective supervision and evaluation of investment projects in Vietnam.

The new provisions of Decree 84 address, among others, inspection, evaluation of investment projects, time frames and the contents of reports on inspection and evaluation, and consultancy services on investment evaluation, and are relevant to investors considering an investment in Vietnam as well as those already investing in Vietnam.

Inspection and evaluation of investment projects

Decree 84 expressly states that investors and enterprises conduct independent inspections and evaluations of their investment projects.

Timeframe and contents of inspection and evaluation report

From the perspective of the Ministry of Planning and Investment (**MPI**), the provisions of Decree 113 on the timeframe, contents of inspection and evaluation reports applicable to investors are not only ineffective and impractical with respect to small and medium sized projects, but are irrelevant to large scale projects with a long term of operation.

Therefore, Article 69 of Decree 84 is considered a noteworthy effort by the MPI to bridge the gap between practice and legislation. Accordingly, investors should pay attention to the timeframe for submission of their reports on inspection and evaluation of investment projects to the investment registration office as follows:

- (i) the report on commencement of an investment project should be sent 15 calendar days in advance;
 - (ii) the report on the change of planning or investment project should be sent prior to the occurrence of such change;
 - (iii) the report on operation of an investment project should be sent 15 calendar days in advance of the inauguration;
 - (iv) the quarterly report should be sent prior to the tenth day of the first month in the following quarter;
 - (v) the bi-annual report should be sent prior to the tenth day of July of the reporting year; and
 - (vi) the annual report should be sent prior to the tenth day of February in the following year.
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Consultancy on investment evaluation

Since Decree 113 remains silent on conditions to implement consultancy services on investment evaluation, the MPI introduced Circular 23/2010/TT-BKH, dated 13 December 2010, providing for conditions applicable to consultancy services on the evaluation of investment projects (**Circular 23**). Generally, conditions set forth under Circular 23 focus solely on the professional capacity of individuals and organisations conducting consultancy on investment evaluation while disregarding financial requirements.

A new set of conditions has been stipulated under Decree 84 which presents a better balance between the professional and financial requirements, especially in terms of organisations providing consultancy services. Of note, Decree 84 requires that any organisation wishing to conduct consultancy services for investment evaluation must have a charter capital of at least VND1 billion. As there is no regulation on the exemption of this new financial requirement, consultancy organisations established prior to the effective date of Decree 84 may be required to adjust their charter capital according to Decree 84.

Decree 84 will take effect as from 20 November 2015, and is expected to be a welcome new mechanism on investment inspection and evaluation.

NEW DECREE ON POLICIES APPLICABLE TO FEMALE EMPLOYEES

On 1 October 2015, the Government of Vietnam issued Decree No. 85/2015/ND-CP, providing detailed guidelines for the implementation of certain articles of the Labour Code on policies applicable to female employees (**Decree 85**). Decree 85 contains certain specific provisions that benefit female employees, and we provide below a brief outline of such provisions.

Employers employing a large number of female employees

Under Decree 85, an employer shall be considered as employing a large number of female employees if the total female employees employed by such employer is:

- (i) from 10 to less than 100 female employees and accounts for 50% or more of the total employees; or
- (ii) from more than 100 to less than 1,000 female employees and accounts for 30% or more of the total employees; or
- (iii) 1,000 or more female employees.

However, Decree 85 notes that:

- (iv) the applicable criteria will be arguable if an employer hires exactly 100 female employees; and
- (v) although according to the Labour Code, enterprises employing a large number of female employees may be entitled to tax incentives in accordance with the applicable tax legislation, the above criteria as provided in Decree 85 is not consistent with the corresponding criteria in the applicable tax legislation.

For example, as provided in the current tax legislation, a company hiring 1,000 female employees shall not automatically be considered as an “employer employing a large number of female employees” to enjoy the relevant tax incentives.

Rights and benefits of female employees

Employers must ensure the following rights and benefits of female employees are met:

(i) Medical check up

During such additional breaks the female employee shall still receive the full wage pursuant to her labour contract. In addition, these regulations spark certain questions as regards (i) whether or not an employer is obliged to make payments if there is no arrangement for the female employee to take such additional break; and (ii) if the payment is required, whether or not such payment is deductible income of the relevant female employee.

(ii) Additional breaks

(a) additional breaks during menstruation

A female employee is entitled to a further break of 30 minutes per day during her menstrual period, which is deemed to be at least three days per month.

The specific duration of breaks shall be agreed between the employer and the female employee, consistent with actual conditions at the workplace and the requirements of the female employee.

(b) additional breaks for nursing mothers of children under 12 months

A female employee is entitled to a further break of 60 minutes per day (within working time) in order to feed her baby, store breast milk and take a rest.

During such additional breaks the female employee shall still receive the full wage pursuant to her labour contract. In addition, these regulations spark certain questions as regards (i) whether or not an employer is obliged to make payments if there is no arrangement for the female employee to take such additional break; and (ii) if the payment is required, whether or not such payment is deductible income of the relevant female employee.

(iii) Minimum term of suspension of labour contract

The minimum term of suspension of the labour contract term due to pregnancy of a female employee shall be agreed upon between such female employee and her employer, but shall be at least equal to the period of time recommended by the medical consultant.

(iv) Sanitary standards

Employers must ensure they have an adequate number of bathroom and facilities appropriate for their workplace in accordance with the regulations of the Ministry of Health.

Employers are encouraged to provide optional support to female employees as follows:

- (i) arrange flexible working timetables, part-time jobs or assignments which can be performed at home, as appropriate for such employees' reasonable expectations;
- (ii) establish designated lactation rooms for breastfeeding employees to express and store breast milk, appropriate for the actual conditions at the workplace, and consistent with the requirements of the female employees and the capability of the employers. Such rooms should satisfy the relevant standards as provided in Decree 85; and
- (iii) provide favourable conditions for breastfeeding children of employees as from 12 months to be able to express and store breast milk in the workplace.

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