# Investing in Vietnam

Contents



2015

## Further information

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This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

*Last updated: July 2015*

# Introduction and Overview

This overview is for foreign investors interested in starting up or expanding operations in Vietnam, either by establishing a new company or buying all or part of an existing one.

- In Part 1, we discuss restrictions on foreign investment.
- In Part 2, we discuss the types of entities a foreign investor may set up.
- In part 3, we discuss how to set up a new entity.
- In part 4, we discuss how to go acquire an existing entity.
- In Part 5, we discuss a variety of related topics, including capital contribution, repatriation of profits, the requirement for a legal representative, permitted borrowing structures, foreign e0078change restrictions and dispute resolution.

We hope you find this brief overview to be a helpful starting point. It is written based on the new Law on Enterprises No. 68/2014/QH13 ("**LOE**") and the Law on Investment No. 67/2014/QH13 ("**LOI**") effective on 1 July 2015, which is the key legislation governing corporate entity formation and investment. This recent development of the legal framework for investing in Vietnam is, together with other important regulatory developments relating to the capital markets, real estate and Public Private Partnerships (PPPs) widely hoped to help smooth and attract the inflow of foreign capital to Vietnam.

# Part 1: Restrictions on Foreign Investment

Vietnamese law permits foreign investment by the following forms:

- establishing a new one party or multi-party owned economic organisation;
- acquiring equity interests in an existing company; or
- entering into a business cooperation contract or PPP contract (which is not discussed further in this note).

Choosing the right form of investment depends largely on the investor's goals and any restrictions in place on the target sector.

As of 1 July 2015, when the new LOI came into effect, Vietnam uses a "negative list" approach permitting foreign investors to conduct business investment activity in all areas outside six prohibited sectors. In practice however, because the legislation is new and untested, it is uncertain how the licensing authorities on the ground will react and foreign investors are likely to still face a complex oversight framework, including an extensive and often time consuming review and approval process, and conditions on involvement in a wide range of sectors. Oversight of foreign investment is generally based on three factors: the type of industry, the geography, and the amount of invested capital.

## 1.1 Limitation on Foreign Ownership

Although Vietnam committed at the time of its accession to the World Trade Organisation ("**WTO**") to open up most service sectors, limitations remain including the permitted forms of investment and the maximum amount of foreign ownership in a joint venture in some industries. The approach of the Vietnamese licensing authorities is to apply the minimum thresholds of foreign ownership committed under the WTO as caps on foreign investment. Key sectors affected include telecoms and logistics.

Additional limitations on aggregate or individual shareholding may apply in industries regulated by sector-specific laws. In the banking sector, for example, the total aggregate shareholding of all foreign investors and their affiliates may not exceed 30% of the charter capital for a Vietnamese bank. Additional approval from the relevant ministries may also be required.

In addition, foreign investors may not acquire more than 49% of issued shares in public companies[1]. However, the new Decree 60/2015/ND-CP, which was issued on 26 June 2015 and comes into effect on 1 September 2015 ("**Decree 60**"), will allow for majority control of public companies by foreign investors subject to existing limitations in certain sectors. Specifically, Decree 60 reaffirms the sector limitations imposed by both international treaties and domestic law. Public companies operating in sectors and/or business lines "subject to conditions applicable to foreign investors" where no specific ownership ratio has been issued will also remain capped at 49%, and it is unclear at this time what sectors this will encompass. The key change is that, aside from these restrictions, up to 100% foreign ownership of a public company will be permitted for the first time.

Under the LOI, enterprises incorporated in Vietnam with 51% or more foreign-owned capital are also treated as "foreign investors" and are required to satisfy the conditions and investment procedures applicable to foreign investors. This rule applies to investment via establishment of an economic organisation as well as investment by capital contribution and acquisition of capital contribution or shares in an economic organisation. Capital from different foreign investors and/or enterprises with 51% or more foreign-owned capital will be aggregated to determine whether the 51% threshold for "foreign investor" status is triggered.

[1] Under the Law on Securities, a joint stock company is a public company if it: (i) has made a public offer of shares; (ii) has shares listed on a stock exchange; or (iii) has shares owned by at least 100 investors (excluding professional securities investors) and paid-up charter capital of VND 10 billion or more (being approximately USD 465,000). A professional securities investor can be a commercial bank, financial institution, finance leasing company, insurance business organisation or securities business organisation.

### 1.2 **Limitation on Investment in Equitised State-owned Enterprises**

The maximum permissible percentage of shares held by private (and not necessarily only foreign) investors in an equitised (privatised) State-owned enterprise (“**SOE**”) is determined by the industry in which it operates. They will be set out in its Equitisation Plan in accordance with the Government's policy from time to time. The current private investment room in equitising SOEs was promulgated by the Prime Minister under Decision 37/2014/QD-TTg dated 18 June 2014 and ranges from 0% in the case of highly sensitive sectors (such as those affecting National Defense and Security or economic and social development) to 49% in industries such as urban lighting and water drainage, environmental sanitation and international sea and railway transportation. In practice, the Prime Minister may grant derogation from this rule in certain sectors.

Under the current regulations governing equitisation, strategic investor(s) and other investors must collectively hold at least 25% of the initial charter capital of the SOE post-equitisation (or lower in certain circumstances but not less than 20%) of which 50% must be held by the other investors. In practice, the 50% rule can be waived by Prime Minister's decision but this requirement does not allow a single investor, including a strategic investor, to buy a majority equity stake in an equitising SOE.

# Part 2: Types of Entities

The LOE permits five corporate forms: partnerships, private enterprises, one-member limited liability companies, multi-member limited liability companies, and joint stock companies. Foreign investors may establish an enterprise with any of these structures and are governed by the same provisions of the LOE as domestic investors. However, in view of the unlimited personal liability incurred through investing by way of private enterprises or partnerships, in practice, the creation of a company is by far the preferred form (and partnerships and private enterprises are not discussed any further in this note).

Foreign investors may set up a 100% foreign-invested enterprise (100% FIE) or a joint venture (JV) with Vietnamese partner(s). A 100% FIE is the most common investment vehicle for foreign investors in Vietnam in relatively small projects with no involvement of Vietnamese partner(s). However, this investment vehicle cannot be formed in all sectors, where a participation of a Vietnamese partner is required under the law. In others, the participation of Vietnamese partner(s) may be necessary or desirable for good business reasons. In practice, most large scale investment projects tend to involve a Vietnamese party to allow entry to sectors otherwise off limits to foreign investors or to benefit from the Vietnamese partner's local know-how or assets.

In a JV, a foreign investor and a domestic investor partner form a new legal entity. A JV can either be a limited liability company or a joint stock company according to the needs and preferences of the parties (as further described below). However, the exact allocation of equity between the parties is often restricted by the JV's line of business. In the road transport services sector, for instance, a foreign partner may only hold up to 51% of a JV company. Capital contributions to JVs may include property rights and land is often provided to satisfy a Vietnamese party's capital contribution requirements.

**Limited Liability Company (LLC)**

LLCs are the most common corporate form for foreign investors in Vietnam. An LLC may have a single member (making it a single member limited liability company, or SMLLC) or multiple members (making it a multi-member limited liability company or MMLLC), with additional documentation and rules governing the latter. A "member" can be any person or organization. At maximum, an MMLLC may have fifty members. If it becomes larger, it must be converted into a joint stock company.

An LLC is established through capital contributions from each member that is treated as equity. Each member is liable for the financial obligations of the LLC to the extent of their contributed capital. There is generally no minimum capital requirement unless the business operates in certain sectors, such as real estate, insurance or banking, where a specific amount is specified by law.

Most notably, LLCs are prohibited from issuing shares to the public. Additional charter capital may only be raised through contributions by existing members or the admission of new members agreed by the existing members.

**Joint Stock Company (JSC)**

Unlike a LLC, there is no upper limit on the number of individuals and/or organisations that may invest in a JSC. A JSC however is required to have at least three shareholders. Where a JSC has more than 100 shareholders or has made a public offer, it can become a "public company" and be listed on one of Vietnam's stock exchanges. Public companies are subject to higher disclosure requirements and other oversight measures. JSCs, whether public companies or not, are also free to issue any type of securities to raise capital. Shares issued by a JSC are, subject to certain limitations, freely transferrable.

The deciding factor in choosing between a JSC and an LLC in Vietnam for many is whether an entity wants to issue shares or become a listed company (LLCs can do neither). In addition, shareholders in a JSC are free to assign their shares (except within a three year period from the establishment of a JSC for the founding shareholders), whereas each member of an LLC holds a pre-emption right with respect to the assignment of the contributed capital of another member.

# Part 3: Setting Up a New Entity

**Investment Registration Certificate required?**

To establish a new company, alone or with a Vietnamese partner, a foreign investor must obtain an investment registration certificate (“**IRC**”). Enterprises incorporated in Vietnam with 51% or more foreign-owned capital are deemed to be foreign investors for this purpose and are also required to obtain an IRC upon investment for establishment of a new affiliated company in which they contribute equity.

The Provincial Department of Planning and Investment registers investments and issues IRCs for all foreign investment projects except for projects developed in specific zones for which the management committees of the zones are empowered to issue IRCs.

The law also requires an enterprise registration certificate (“**ERC**”) to be obtained by the Company after issuance of the IRC. This document constitutes the Company’s incorporation document and is issued by the Provincial Department of Planning and Investment. Unlike the IRC which involves some assessment of the foreign investor’s “investment project” by the authorities, the ERC is supposed to be granted fairly automatically.

**Lines of Business**

Foreign investors must specify the objectives of the investment project which will be reflected in the IRC. The objectives are in practice equated by the licensing authorities to lines of business of the company set out in the charter. Companies may only engage in their approved lines of business. In addition, the company must show that it, or a parent or related company, has sufficient expertise in that industry before it will be allowed to incorporate or include that line of business in its permitted activities. A company may amend the lines of business, but the process is not always straightforward and will be subject to further review by the competent Vietnamese authorities.

**In-principle approval**

The LOI has added further licensing formalities by requiring investors (domestic or foreign) in certain special, sensitive or very large scale projects to obtain approvals from the National Assembly, the Prime Minister or the People's Committee prior to licensing.

Furthermore, foreign investment projects in service sectors such as sea transportation, telecommunications with network infrastructure, afforestation, publication and press must also obtain "in-principle" approval from the Prime Minister.

After obtaining "in-principle" approval for a project by the relevant authority, an investor will also need to seek an amendment of such approval at the same level before making changes to project objectives, location, duration or main technology, changes to investment capital in excess of 10%, or changes to the identity of or conditions applicable to project investors.

**Timeline**

The LOI attempts to streamline what has been a notoriously difficult and unpredictable licensing process by reducing the timeline for granting an IRC from 45 days (for investments requiring evaluation under the previous Law on Investment) to 15 days, prohibiting the licensing authorities from requesting documents beyond those listed in the LOI, and allowing certain permit applications (e.g. environment assessment evaluation, registration of environment protection plan, evaluation of fire prevention and fighting plan, and approval of construction plan) to be filed simultaneously with the application for the IRC. It remains to be seen, however, how such provisions will be applied in practice.

With respect to an investment project in a category which requires an “in-principle” approval from the competent authority prior to licensing, an IRC will be issued upon approval from the competent authority within five working days. For projects subject to approval by the National Assembly, the approval process is stipulated to take more than 98 days, which also depends on the session schedule of the National Assembly. For projects subject to approval by the Prime Minister and the Provincial People’s Committee, the approval process is stipulated to take more than 45 and 37 days respectively.

The LOE sets out a timeline of 3 working days for issuance of an ERC to the company after issuance of IRC in respect of its project.

# Part 4: Acquiring an Existing Entity

**Registration required**

Under the LOI, foreign investors are now clearly not required to obtain an IRC if they are solely buying shares or contributing capital to an existing Vietnamese enterprise.

Rather than undertaking the more burdensome IRC approval process, foreign investors (including enterprises with 51% or more foreign-owned capital) who acquire 51% or more of the shares or equity in a company, or foreign investors who acquire shares or equity in a company which operates within a conditional business sector, are now only required to carry out a registration with the local Department of Planning and Investment where the target company is located before completing the acquisition.

Acquisitions by foreign investors of less than 51% of the shares or equity in a company not operating within a conditional business sector (which are now listed comprehensively under 267 sections in Appendix 4 of the LOI) are no longer subject to any registration requirements, and the foreign investor may simply carry out the necessary procedures for changing the company's shareholder or member structure. This could significantly improve the previous situation in which an acquisition by a foreign investor of any amount of equity in an existing Vietnamese company was subject to burdensome investment licensing procedures and a great degree of uncertainty as practices across the country could vary significantly.

**Timeline**

For an acquisition by a foreign investor of 51% or more of shares or equity in a company or an acquisition by a foreign investor of shares or equity in a company which operates within a conditional business sector, the local Department of Planning and Investment must register the acquisition within 15 days from the date of receipt of a complete file.

**Acquiring Share in Public Companies**

Purchasers may acquire newly issued shares of a public company through a subscription, or purchase shares from existing shareholders in a company. Foreign investors are required to comply with certain formalities under the securities regulations when purchasing shares in a listed public company. Most significantly, the investors will need to obtain a “trading code” at the Vietnam Securities Depository and open an account dedicated to the transaction with a depository bank authorised by the State Bank of Vietnam to conduct foreign exchange transactions.

In addition, acquisitions of shares from existing public company shareholders may also trigger mandatory tender offer requirements if certain purchase thresholds are exceeded.

# Part 5: Other Topics

### 5.1 Charter capital vs contributed capital

Both the LOI and the LOE draw a distinction between charter capital (which is contributed by an investor to establish the enterprise) and contributed capital (which is contributed by the investor to implement a specific investment project). Although the LOE requires that charter capital must be contributed in full within 90 days of establishing an enterprise, the draft implementing decree of the LOI as at 1 July 2015 makes clear that an enterprise's charter capital is not required to equal the amount of contributed capital registered under the IRC at the time of enterprise formation. Rather, contributed capital can be provided as required in accordance with the progress of the specific investment project. Although this provides flexibility to investors regarding when to provide contributed capital, it creates uncertainty when determining owner equity when there is a difference between the respective amounts of charter capital and contributed capital contributed by an investor. The enterprise will also be required to subsequently amend its ERC to reflect any increase in charter capital where a smaller amount is contributed initially and supplemented with further contributions over time as a specific project progresses.

### 5.2 Repatriation of Investment

The LOI permits a foreign investor in Vietnam, after discharging its financial obligations to the State, to remit certain capital abroad. This is limited to invested capital and proceeds from liquidation of investment, income derived from business investment activities (although these may only be remitted on an annual basis), and other funds or assets lawfully owned by the foreign investor. Where management is controlled by a foreign investor, remittance of capital abroad may only be made through designated capital contribution accounts. In practice, the remitting “authorized credit institution” requires supporting evidentiary paperwork as well.

### 5.3 Legal Representatives

All Vietnamese corporate entities must have at least one designated legal representative. The legal representative is the person who holds the most responsibilities in the management and functioning of the company. The law requires at least one legal representative of the company to be residing in Vietnam. If the company has only one legal representative, that person must reside in Vietnam and a delegation of powers must always be signed in case of absence of more than 30 days.

The legal representative is authorized to act and sign on behalf of the company (contracts, communications with authorities etc.) and is notably responsible for the management and use of the company seal.

The legal representative is personally liable when he acts outside of his scope of rights (as defined in the laws and the constitutional document of the company) and causes damage to the company, its shareholders, or third parties.

### 5.4 Total Investment Capital and Permitted Borrowing

Total investment capital comprise of contributed capital of the investor and the permitted borrowings. The total investment figure must be included in the documents for the IRC and is registered in the IRC, and is therefore subject to approval and re-registration if amended. Vietnamese law requires that the medium and long-term loans (including domestic and foreign loans) shall not be greater than the indebtedness capacity of enterprises with foreign-owned capital.

### 5.5 Foreign Exchange Restrictions

The remittance of investment capital and profit, the payment of loan interest or the conversion into foreign currency are subject to foreign exchange control legislation under the Ordinance on Foreign Exchange Control No. 28/2005/PL-UBTVQH11 dated 13 December 2005 as amended by Ordinance No. 06/2013/UBTVQH13 and its guiding documents. According to these regulations, foreign invested enterprises must open a direct investment capital account at an authorised bank in Vietnam for receipt of capital contributions and disbursement of capital, profit and other legal revenue of foreign investors. In addition, all transactions, payments, quotations, advertisements and pricings within the territory of Vietnam must be conducted in Vietnamese dongs, with some exceptions.

The LOE requires that all activities of share purchase and sale, capital contribution assignment, receipt of distributed dividends and profit by a foreign investor must be conducted via a capital account of a foreign investor opened at a bank in Vietnam.

### 5.6 Dispute Resolution

As the process is generally inefficient and time-consuming (about two years and longer in the case of an appeal) and courts in Vietnam largely lack experience in handling disputes with an international element, it is generally recommended to select arbitration for disputes between foreign and Vietnamese parties. Where the matter or projects involves purely Vietnamese corporate matters, and particularly if the investment project is relatively small in size, arbitration seated in Vietnam may be an appropriate choice of dispute resolution forum. On the other hand, we recommend using offshore arbitration (generally in Singapore) for larger, more complex matters which may involve aspects of international practice.

Although the quality of any award of domestic arbitration will likely be lesser, and the possibility of influence is probably greater than if the dispute was submitted to international arbitration, it is likely that any award granted will be enforceable more easily in Vietnam, and the costs and practicalities of administering a Vietnamese law governed dispute in Vietnam should be less onerous.

Offshore arbitration is preferable to foreign investors due to their reputation for transparency and efficiency and the problems cited above with Vietnamese arbitration. However, in practice, even having acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 28 July 1995, enforcement of foreign arbitral awards in Vietnam can be onerous and time consuming, and the outcome is still uncertain.

# Concluding Remarks

Vietnam's stable political system, large and inexpensive labour force, membership in the ASEAN trading block, and location near key Asian markets make it an attractive destination for foreign investment. Foreign direct investment is an important element of Vietnam's economy, and in 2014 the foreign direct investment sector contributed 62% of total exports. Vietnam's integration into ASEAN Economic Community (AEC) in 2015 and eventual accession to the Trans-Pacific Partnership (TPP), as well as the anticipated agreement on the EU-Vietnam Free Trade Agreement, have the potential to significantly expand the opportunities for foreign investment in the future.

Nonetheless, foreign investors face a variety of challenges in Vietnam that should be accounted for in the planning process. These include a shortage of skilled labour, a highly bureaucratic regulatory system, corruption and a weak legal structure. Generally, the government of Vietnam continues to focus on controlling foreign investment rather than facilitating growth. These issues are reflected in the World Bank Group's 2015 ease of doing business index, which ranked Vietnam at 78th out of 189, relative to 99th in 2014. As discussed above, however, recent updates to the legal framework governing foreign investment have, at least on paper, streamlined the licensing process in a number of respects. Despite a number of encouraging statements from high levels of Government, it remains to be seen how these new laws will play out in practice.

Our Vietnam teams have extensive experience in how to go about doing business in Vietnam in a way that maximises the chances of success, and so invite you to contact one of our lawyers to discuss any questions you may have.

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