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COMPLIANCE & CORPORATE GOVERNANCE CHANGES IN VIETNAM

(Focus on Law on Investment and Law on Enterprises 2020)

What You Need To Know

European Chamber of Commerce Vietnam

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Elaine Chew

ABOUT ACSV LEGAL

ACSV Legal is a Ho Chi Minh City, Vietnam-based law firm. The firm is led by Managing Partner, Mark Oakley who has been living and working in Vietnam since 2007.

Established in 2014 and most recently, at the end of March 2018, it was rebranded to ACSV Legal, with a new logo and new website: www.acsvlegal.com.

ACSV Legal has a premier corporate/M&A practice in Vietnam and its approach is to understand the legal, commercial and political dynamics of every matter. We have extensive experience in private equity transactions with a focus on a strong commercial approach.

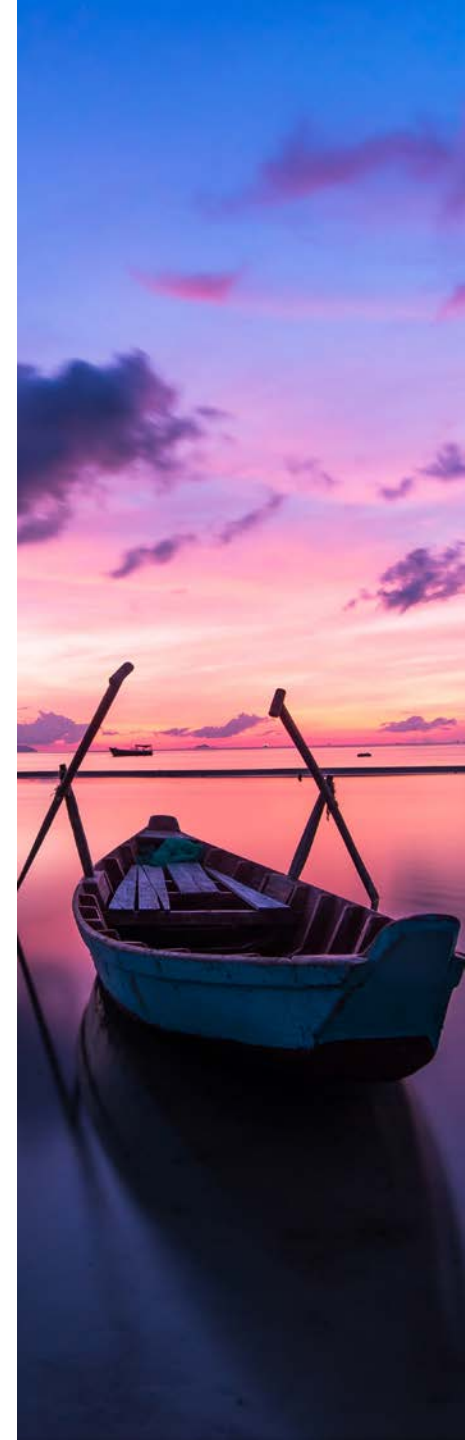
ACSV Legal currently has a team of lawyers who are qualified in Vietnam and abroad in civil and common law jurisdictions. Our lawyers are bi-lingual in Vietnamese, German, English, Italian, Dutch, French and Malay.

Our clients are active in a wide range of sectors and industries: manufacturing, food & beverage, hospitality and leisure, education, pharma, health, beauty & fitness, IT, apparel and fashion, retail and public relations.



AGENDA

- ABOUT ACSV LEGAL
- OVERVIEW
- LAW ON INVESTMENT 2020 (LOI 2020)
- LAW ON ENTERPRISE 2020 (LOE 2020)
- CONCLUSION
- CONTACT US



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OVERVIEW

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- On 17 June 2020, the National Assembly ratified the Law on Enterprises No. 59/2020/QH14 (**LOE 2020**) and the Law on Investment No. 61/2020/QH14 (**LOI 2020**)
- In general, new changes set out more favourable conditions for enterprises
- Both laws took effect as of 1 January 2021 (except specific points in the LOI 2020)



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LAW ON INVESTMENT 2020

NEGATIVE LIST

New 'negative list' approach to market access applicable to foreign investors

- The government will issue two lists of business sectors and lines which are (1) restricted and (2) conditional for foreign investors (*Article 9 (2) LOI 2020*)
- If not on either list, foreign investors will be treated the same as domestic for purposes of investment
- Represents a major shift in the approach to foreign investment:
 - Expected to increase transparency and consistency
 - Lists will be issued by the government in decree implementing the LOI 2020

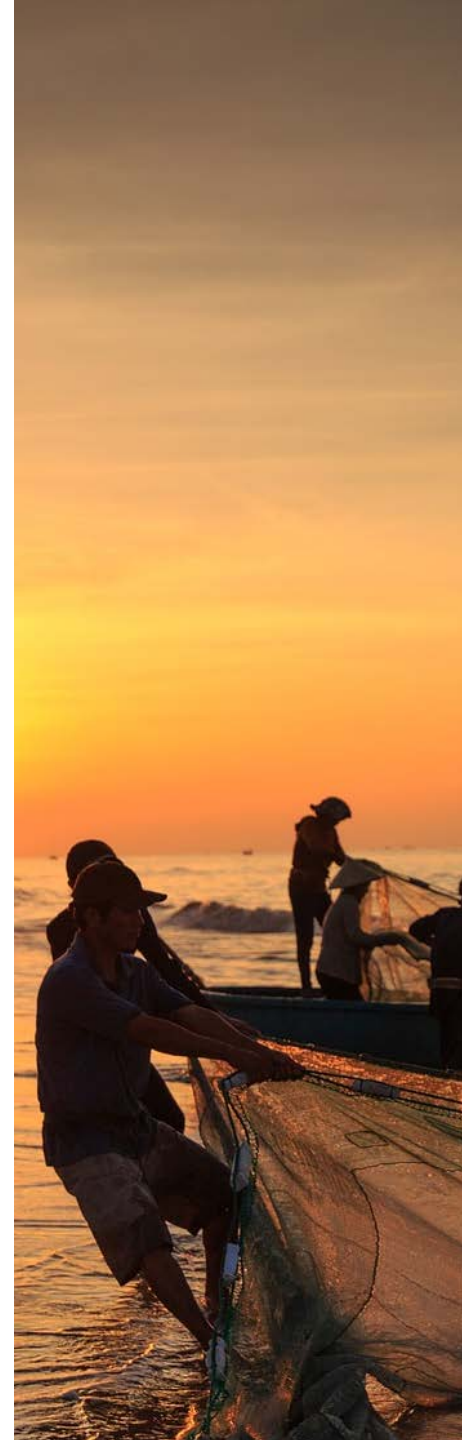


PROHIBITED AND CONDITIONAL BUSINESS SECTORS

Changes to the list applicable to both foreign and domestic investors (*Full list of conditional business lines is specified in Appendix IV of the LOI 2020*)

- Removed from the conditional sector list (*non-exhaustive*):
 - Franchise services
 - Logistic services
 - Cosmetic surgery services

- New to the conditional sector list (*non-exhaustive*):
 - Supplying clean water
 - Architectural services
 - Imported press release services
 - Data centre services



PROHIBITED AND CONDITIONAL BUSINESS SECTORS (CONTINUED)

- Reduced from 243 to 227 conditional business lines
- Emphasises the aim of the National Assembly to liberate trade activities
- The National Assembly added many essential business lines as conditional business sectors to ensure social security, economic and health



NEW FOREIGN OWNERSHIP THRESHOLD

- Economic organisations with foreign investors holding **more than 50%** of charter capital (as opposed to **51% or more** under the previous law) are required to meet the conditions and carry out investment procedures for foreign investors (*Article 23(1) LOI 2020*)

NOMINEE ARRANGEMENTS UNDER SCRUTINY

- Under Article 124 of the Civil Code of 2015, if parties *“falsely enter into a civil transaction for the purpose of concealing another transaction, the false transaction shall be invalid and the concealed transaction remains valid, unless it is also invalid under the provisions of this Code or relevant laws”*
- The LOI 2020 now allows Vietnamese authorities to terminate an investment project if investor uses false transaction (*Article 48 (2)e LOI 2020*)



NATIONAL SECURITY MEASURES

- The LOI 2020 states that investments shall be suspended or terminated if such activities are *“harmful, or are in danger of harming national defense or security”*

SIMPLIFICATION OF M&A PROCEDURES

- The LOI 2020 removes the registration requirement where an M&A transaction does not result in an increase of the foreign ownership percentage of the target company



INVESTMENT INCENTIVES

- Expanded the form of incentives: *(Article 15(1)d LOI 2020)*
 - Accelerated depreciation, increasing the deductible expenses of taxable income
- In general, introduces special investment incentives and support for projects with a large socio-economic impact, as well as criteria to determine such projects *(Article 20 LOI 2020)*
- Added more beneficiaries of investment incentives: *(Article 15(2) LOI 2020)*
 - Projects employing disabled workers
 - Projects with minimum capital investment of VND 6,000 billion, or at least VND 6,000 billion disbursed within 3 years from the date the Investment Registration Certificate or decision on investment policies is issued, subject to certain criteria
 - Projects of constructing social housing



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LAW ON ENTERPRISE 2020

EXPANSION OF SCOPE OF STATE-OWNED ENTERPRISES

- Under the previous LOE, a state-owned company was defined as an enterprise of which **100% of its charter capital is held by the State** (*Article 4(8) LOE 2014*)
- The LOE 2020 redefines this by expanding the scope to include an enterprise in which **the State holds over 50% of its charter capital or total voting shares** (*Article 4(11) LOE 2020*)



RESPONSIBILITY OF MULTIPLE LEGAL REPRESENTATIVES

- Specific rights and duties of each appointed representative must be recorded in the charter of the company
- If the above is not adhered to, all authorized representatives of the company will be jointly responsible should there be any liability/damages

ABOLISHMENT OF CONTROL BOARD/ CONTROLLER REQUIREMENT

- Multi-member LLCs are no longer required to establish a control board, unless such company is held by the State (*Article 54(1) LOE 2020*) and single-member LLCs are no longer required to nominate a controller (*Article 79(1) LOE 2020*)
- LOE 2020 provides possible two organisation structures



SEALS

- Enterprises are no longer required to notify the seal sample to the business registration authority through the National Business Registration Portal
- LOE 2020 recognises electronic seals registered in line with the law (*Article 43(1) LOE 2020*)
- Benefits of electronic seals / signatures:

Enterprises will be more confident in entering into electronic transactions

Facilitate the flexibility and efficiency in executing documents



Eliminate barriers of administrative procedures



CAPITAL CONTRIBUTION TIMELINE

- Currently there is a 90-day requirement for capital contribution upon establishment of a company
- The new law allows certain exceptions in case of in-kind contributions where the time required for transportation/importation of assets or completion of changes of ownership are not counted as part of the 90-day time limit

MINORITY SHAREHOLDER PROTECTION

- In general, LOE 2020 provides greater minority shareholder protections (*Article 115(5) LOE 2020*)
- Any shareholder or group of shareholders that hold at least 5% of ordinary shares shall have certain rights (*Article 115(2) LOE 2020*)



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CONCLUSION

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- Seek to promote private sector and efficiency of state-owned enterprises
- Improve the business environment and competitiveness
- Reduce the administrative costs and procedures imposed on enterprises
- Uncertainty remains as to specific conditions, as well as the potential use of the blanket national security provision
- Vietnam's ratifications to EVFTA and CPTPP signal its commitment to provide certainty and opportunities to foreign investors





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