

Foreign Investment Review 2020

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Oliver Borgers
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Lexology Getting The Deal Through is delighted to publish the ninth edition of Foreign Investment Review, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Armenia, Cambodia, Laos, Mexico, Myanmar, New Zealand, Thailand and Vietnam.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.



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LAW AND POLICY

Policies and practices

1 | What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Generally, there are specific factors the government will consider before approving foreign investment in Vietnam. In particular, foreign investment restrictions are provided in Vietnam's World Trade Organization (WTO) commitments and its other international or bilateral treaties and domestic laws, including those on national security, antitrust and corporate approval. See question 9.

The currency control of foreign investment is uniformly managed through the capital account system. When making indirect investment in Vietnam, foreign investors only need to open indirect investment accounts at credit institutions to carry out money transfers related to indirect investment activities.

Companies with foreign direct investment (FDI) in Vietnam are required to open accounts of direct investment capital at credit institutions to perform capital transfer transactions related to direct investment activities.

The monitoring is carried out through an information and reporting mechanism. Credit institutions where foreign indirect investors and FDI companies open accounts must comply with the regime of monthly reports prescribed by the State Bank of Vietnam (SBV). Thereby, the SBV can capture timely information on capital flows from investment activities in order to assess the impact of capital flows on the stability of the foreign exchange market in particular and the economy in general.

Main laws

2 | What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

There is no single law governing acquisition and investment by foreign nationals and investors on the basis of the national interest in Vietnam. Foreign investors who wish to invest in Vietnam should pay attention to the specific main laws and regulations related to acquisition and investments, including:

- WTO commitments: the Schedule of Specific Commitments in Services, which describe the services Vietnam is allowing foreign service providers to access and additional conditions including, among other things, limits on foreign ownerships in a Vietnam-based company;
- Law on Enterprises No. 68/2014/QH13 adopted by the National Assembly of Vietnam on 26 November 2014 and its implementing and guiding regulations (Law on Enterprises), which governs the

establishment, organisation, restructuring, dissolution and relevant activities of companies in Vietnam;

- Law on Investment No. 67/2014/QH13 adopted by the National Assembly of Vietnam on 26 November 2014 and its implementing and guiding regulations (Law on Investment), which generally governs investment activities by or in companies;
- Law on Securities No. 70/2006/QH11 adopted by the National Assembly of Vietnam on 29 June 2006, as amended by Law No. 62/2010/QH12, and its implementing and guiding regulations (Law on Securities);
- Law on Competition No. 23/2018/QH14 adopted by the National Assembly of Vietnam on 12 June 2018 and its implementing and guiding regulations (Law on Competition);
- Ordinance on Foreign Exchange Control No. 28/2005/PL-UBTVQH11 adopted by the Standing Committee of the National Assembly on 13 December 2005, as amended by Ordinance No. 06/2013/UBTVQH13 dated 18 March 2013 (Ordinance on Foreign Exchange Control); and
- other specific legislation applicable to foreign investment in Vietnam-based companies that engage in certain regulated areas, for example, banking, financial services and insurance.

Scope of application

3 | Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

For the accession to the WTO, Vietnam committed to open the market to foreign investments in certain service sectors under the WTO commitments. Until now, there are still some restrictions on the maximum foreign ownership percentage or the forms of investment with respect to some service sectors. For instance, advertising services require the foreign investor to set up a joint venture with an existing Vietnamese advertising company, while some transportation and banking services have an aggregate cap for the foreign ownership.

The Law on Investment is the primary domestic law for the foreign investment activities in Vietnam. It provides a list of conditional business lines, and the foreign investor must meet certain conditions to engage in such business in Vietnam. Among the service sectors on the list, the ones that are subject to special scrutiny include the services of banking, education, telecommunications with network infrastructure, publishing and healthcare.

The Law on Enterprises provides the legal framework for the corporate establishment, corporate governance and operation of an enterprise in Vietnam.

Definitions

4 | How is a foreign investor or foreign investment defined in the applicable law?

Under the Law on Investment, a 'foreign investor' means an individual holding a foreign nationality or an organisation established under foreign laws making business investment in Vietnam. However, the term 'foreign investment' is not defined in the Law on Investment. Instead, the Vietnamese lawmakers introduced the term 'business investment' that is broadly described as investment activities conducted by investors, including foreign investors, Vietnamese investors or foreign-invested business organisations in Vietnam. In particular, business investment means an investor's investing of capital to do business by establishing a business organisation; making capital contribution in or buying shares or capital contributions in a business organisation; making investments in the form of contracts; or the implementation of investment projects.

Special rules for SOEs and SWFs

5 | Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

Vietnamese law does not provide any specific definitions or any special rules applicable to foreign SOEs and SWFs. Foreign SOEs and SWFs are accordingly responsible for complying with investment regulations under Vietnamese law, which all foreign investors must comply with while investing in Vietnam.

Relevant authorities

6 | Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

Under the Law on Investment, if a foreign investor would like to acquire shares or contributed capital in a Vietnam-based company, they should obtain written approval for these acquisitions from the Department of Planning and Investment where the Vietnam-based company is located if: (i) the foreign investor contributes capital or acquires shares in the Vietnam-based company engaging in any business line that is conditional for foreign investors; or (ii) the foreign investor acquires over 51 per cent of shares of the Vietnam-based company.

National interest

7 | Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

If foreign investors have satisfied all legal requirements applicable to their investments in Vietnam, the authorities theoretically are not allowed to reject a transaction conducted by the foreign investors on national interest grounds. In particular, foreign investors will be permitted to invest in all sectors and industrial areas that are not prohibited under the Law on Investment. However, in practice, the authorities have the sole discretion to approve or reject any transactions conducted by the foreign investors if they decide that such foreign investors have not met their requirements based on their view. Of note, Vietnamese law does not give any clear instructions or regulations on the grounds the authorities can use to approve or reject investment transactions.

PROCEDURE

Jurisdictional thresholds

8 | What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

Foreign investors invest in Vietnam by applying for a new investment project; such foreign investors should submit dossiers to register their investment projects with the proper authorities (for example, the Department of Planning and Investment or the industrial zone's management authorities if investment projects are located in industrial zones). However, in certain investment projects, the foreign investors may also need to obtain 'in-principle' approvals from the state authorities, including the National Assembly, the prime minister or the Provincial People's Committees. In particular:

- the National Assembly's 'in-principle' approvals for investment projects that have a significant impact on the environment, for example, nuclear power plants; investment projects involving the relocation of 20,000 or more people in mountainous areas or 50,000 or more in other areas; or the conversion of land for wet rice cultivation of 500 hectares or more for other purposes; and other special investment projects as determined by the National Assembly;
- the Prime Minister's 'in-principle' approvals for investment projects that involve the relocation of 10,000 or more people in mountainous areas or 20,000 or more in other areas; airport projects, seaport projects, oil and gas projects, projects having gambling, cigarette-manufacturing projects, industrial/export processing/economic zone projects, and golf course projects; projects with total investment from 5 trillion dong; projects of foreign investors in sea transportation, telecommunication with network infrastructure, afforestation, publication, press, establishment of a scientific and technological company with 100 per cent foreign-owned capital; and other projects under the authorisation of the prime minister as regulated by other related laws of Vietnam; and
- the Provincial People's Committee's 'in-principle' approvals for investment projects in which the state allocates or leases land without auction, tender, or transfer; projects involving conversion of land-use purposes; and projects utilising technology on the technology transfer restricted list.

National interest clearance

9 | What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

Acquisitions and investments by foreign nationals and investors are normally subject to the following substantive test for clearance:

- Foreign investment restrictions: foreign investment restrictions are provided in (i) Vietnam's WTO commitments and other international or bilateral treaties of Vietnam; and (ii) domestic laws. Vietnam's WTO commitments are the most important and comprehensive international treaty provisions in relation to foreign investment. They provide for Vietnam's commitments to give foreign investors market access (and limitations thereon) to all key service sectors. Vietnam's WTO commitments and other treaties are supplemented by a set of domestic laws, including the Law on Investment and Law on Enterprises, and other specialised laws regulating specific business sectors. Foreign investment restrictions exist primarily in the form of prohibition of foreign investment, foreign ownership limits, requirements for joint ventures with local partners, regulatory approvals for foreign investment, or a combination thereof. The foreign investors are responsible for providing a detailed analysis in their application on satisfying foreign investment restrictions.

This may include consultation with relevant ministries, and preparation and presentation of evidence relating to the investor's expertise and experience in the relevant industry.

- National security: this is a new policy that was issued on 20 August 2019. On that day, the Politburo of the Communist Party of Vietnam issued Resolution No. 50-NQ/TW on orientation for completing the legal framework and policies, and improving the quality and effectiveness of foreign cooperation and investment up to 2030. Accordingly, 'national security' is one of the key factors in considering FDI and new regulations will be issued to implement this policy. When issuing investment certificates to new projects or M&A transactions, licensing authorities will likely need to also take into account national security considerations. This is something we need to watch closely and will have negative impacts on Chinese investments given the recent tension between the two countries.
- Antitrust: generally, a business combination involving a Vietnamese company may be subject to reporting requirements. Under the Law on Competition 2019, before carrying out acts of economic concentration by enterprises (defined as mergers, consolidations, acquisitions, joint ventures and other acts of economic concentration prescribed by law) are prohibited if they are evaluated to 'have or potentially have the effect of significantly restricting competition in the Vietnam market'. The National Competition Commission will evaluate factors such as: (i) the combined market share of the participating companies; (ii) the level of concentration in the relevant market before and after the economic concentration; and (iii) competitive advantages gained from the economic concentration;
- Corporate approval: corporate approvals need to be obtained in some specific cases to consummate the transaction. For example, the share transfer of founding shareholders within three years from the issuance date of the enterprise registration certificate to other persons other than founding shareholders must be approved by the General Meeting of Shareholders.

Securing approval

10 | Which party is responsible for securing approval?

Vietnamese law does not stipulate that a particular party should be responsible for securing an approval. In practice, it is normally understood that all parties involved in M&A transactions should together engage in obtaining the approvals. However, in some certain cases, parties could negotiate or clearly appoint a party to be responsible for obtaining the approvals as a condition precedent to complete transactions.

Review process

11 | How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

With respect to a new investment project, the timeline for a foreign investor to obtain an Investment Registration Certificate is 15 days from the date of full submission of the dossiers that are required under the Law on Investment. If the investment project is subject to the procedures for requiring 'in-principle' approvals from the state authorities, including the National Assembly, the prime minister or the Provincial People's Committees as mentioned in question 8, the foreign investors accordingly would need more than 90 days to get approvals from the National Assembly and more than 45 and 35 days to get approvals from the prime minister or the Provincial People's Committees, respectively. However, in practice, the timeline is usually longer compared with the timeline stipulated in the Law on Investment.

In addition, there are any not exemptions or expedited or 'fast-track' options under Vietnamese laws.

Clearance penalties

12 | Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Under the Law on Investment, approvals from the Department of Planning and Investment are required for acquisitions by foreign investors of a Vietnam-based company that engages in any business line that is conditional for foreign investors, or acquisitions of a Vietnam-based company that lead to foreign ownership in such Vietnam-based company exceeding 51 per cent of shares or equity.

If the foreign investors have not obtained such approvals for their acquisitions, they would not be officially recorded as a new member or shareholder of the Vietnam-based company since the dossiers for registering the foreign investors as a new member or shareholder will likely be rejected by the Department of Planning and Investment owing to the lack of the above-mentioned approvals.

Involvement of authorities

13 | Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Normally, the foreign investors can officially, or unofficially, ask for guidance from the authorities prior to a filing being made. However, such guidance is non-binding and in some worst-case scenarios such guidance may be different from what is ultimately applied to the foreign investors' investment.

Facilitating clearance

14 | When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

General speaking, government relations, public affairs, lobbying or other specialists should not be used for supporting the review of a transaction by the authorities. Vietnamese law does not provide lawful informal procedures to facilitate or expedite clearance.

Post-closing powers

15 | What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

The authorities (ie, the courts or arbitration) still have to review, challenge or unwind a transaction after its completion if either contractual party requests the authorities to declare the merger contract invalid. In addition, there are other cases where an investment registration certificate or enterprise registration certificate is revoked because of false information.

SUBSTANTIVE ASSESSMENT

Substantive test

- 16 | What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

See question 9.

Consulting other countries

- 17 | To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

Under Vietnamese law, there is no requirement for the Vietnamese authorities to consult or cooperate with officials in other countries during the substantive assessment of an investment project, except for asking for confirmation on the legal status of the foreign investors (if the investor is an organisation) and their authentication or certification of legal documents of foreigners for Vietnam to be able to recognise them as having full legal effect.

Other relevant parties

- 18 | What other parties may become involved in the review process? What rights and standing do complainants have?

There are no regulations requiring other parties or other authorities to be involved in the review process. During the review process, the other parties may only become involved in the review process as consulting parties for the authorities in charge to make decision.

Prohibition and objections to transaction

- 19 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

If the foreign investors fail to satisfy the required test as discussed in question 9, the authorities can prohibit the consummation of the transaction and refuse to issue an investment certificate or approval for the foreign investment. In the case of antitrust, if the foreign investors ignore such prohibition, administrative penalties of up to 5 per cent of the total turnover of the breaching parties on the relevant market in the fiscal year preceding the year of violation will be applied to the breaching parties and their business licences or certificates may be revoked. In the case of lacking the necessary corporate approvals, the transaction may be invalid.

Mitigating arrangements

- 20 | Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

To our knowledge, there are not yet any precedents in practice for such undertakings and arrangements.

Challenge and appeal

- 21 | Can a negative decision be challenged or appealed?

When there are grounds for determining that such negative decisions are illegal or infringe upon the rights and interests of the foreign investors, the foreign investors have the right to appeal such decision to the official who has issued the administrative decision or the agency that manages such official or institute an administrative lawsuit at a court in accordance with the Law on Administrative Procedures (‘first-time

complaint settlement’). In the case where the foreign investors disagree with the first-time complaint settlement decision or the complaint remains unsettled although past the prescribed time limit, they can make a second-time complaint with the direct superior of the person with the competency to settle the first-time complaint or institute an administrative lawsuit at a court in accordance with the Law on Administrative Procedures.

Confidential information

- 22 | What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

The law does not provide specific safeguards to protect confidential agreements. Instead, contractual parties protect the confidential information subject to their mutual agreement. The parties can keep information confidential through a non-disclosure agreement before disclosing the information to the other party. The failure to comply with such agreement will be subject to penalties (ie, 8 per cent of the breached obligation) and compensation (full damages) as required by the commercial and civil laws, which is similar to breaches of normal agreements or contracts.

RECENT CASES

Relevant recent case law

- 23 | Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

Case 1: Approvals from the Department of Planning and Investment

Under the Law on Investment, if a foreign investor would like to acquire shares or contributed capital in a Vietnam-based company, the foreign investor should obtain a written approval for these acquisitions from the Department of Planning and Investment where the Vietnam-based company is located if the Vietnam-based company is engaging in any business line that is conditional for foreign investors. This regulation can be interpreted to mean that if foreign investors invest in a Vietnam-based company engaging in a business line that has no conditions for foreign investors, the foreign investors may not need to obtain approvals from the Department of Planning and Investment. However, this approach has been rejected by the Department of Planning and Investment of Ho Chi Minh City, which takes the view that acquisition by foreign investors of a Vietnam-based company engaging in any business lines that are stipulated in the WTO commitments must be approved, although some of the business lines stipulated in the WTO commitments have no conditions for foreign investors.

Case 2: Specifying detailed list of products that an FDI company imports and distributes in Vietnam

The licensing authorities (the Department of Planning and Investment or the Industrial Zones Authority) of certain provinces or cities still record the list of products that an FDI company registers for import or distribution in Vietnam. However, in some other provinces or cities, the licensing authorities no longer record the specific types of products. Instead, the licensing authorities will give the FDI company the broadest scope for conducting the trading of any products that are not banned from being imported or distributed in Vietnam and the FDI company is required to satisfy certain conditions, if any, in accordance with the applicable laws and regulations of Vietnam.

Case 3: Ad hoc approval for business lines

For certain business lines that foreign investors want to register FDI companies for in Vietnam, but are out of the scope of services as committed to by Vietnam to the WTO in the field of services, or beyond the scope of business lines classified under the Vietnamese Business Code System, such activities will be considered ad hoc business lines. In this circumstance, the local licensing authorities are legally required to obtain in-principle approvals from the ministerial authorities prior to granting the Investment Registration Certificate to the investors.

UPDATE AND TRENDS**Key developments of the past year**

- 24 | Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

On 20 August 2019, the Politburo of the Communist Party of Vietnam issued Resolution No. 50-NQ/TW on orientation for completing the legal framework and policies and improving the quality and effectiveness of foreign cooperation and investment up to 2030. Accordingly, 'national security' is one of the key factors in considering FDI and new regulations will be issued to implement this policy. When issuing investment certificates to new projects or M&A transactions, licensing authorities will likely need to also take into account national security considerations. This is something that foreign investors need to watch closely and will have negative impacts on Chinese investments given the recent tension between the two countries.

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