

Foreign Investment Review 2021

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Foreign Investment Review 2021

Contributing editor

Oliver Borgers
McCarthy Tétrault LLP

Lexology Getting The Deal Through is delighted to publish the tenth 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 the European Union, France, Italy, Pakistan, Spain, Sri Lanka and Uzbekistan.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

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.

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 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 limits on foreign ownerships in a Vietnam-based company;
- the Law on Enterprises No. 59/2020/QH14 adopted by the National Assembly of Vietnam on 17 June 2020, effective from 1 January 2021, which governs the establishment, organisation, restructuring, dissolution and relevant activities of companies in Vietnam;

- the Law on Investment No. 61/2020/QH14 adopted by the National Assembly of Vietnam on 17 June 2020, effective from 1 January 2021, which generally governs investment activities by or in companies;
- the Law on Securities No. 54/2019/QH14 adopted by the National Assembly of Vietnam on 26 November 2019, effective from 1 January 2021;
- the Law on Competition No. 23/2018/QH14 adopted by the National Assembly of Vietnam on 12 June 2018 and its implementing and guiding regulations;
- the 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; 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', which is generally defined as an investor investing capital to do business. This term is broadly described as investment activities conducted by investors, including foreign investors, Vietnamese investors, or foreign-invested business organisations in Vietnam.

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, it should obtain written approval for this acquisition from the Department of Planning and Investment where the target company is located, if: the target company is engaging in any business line that is conditional for foreign investors and the share acquisition or capital contribution by the foreign investor results in an increase in the foreign ownership ratio of this company; the foreign investor acquires over 50 per cent of the shares of the target company; or the foreign investor acquires shares in a target company with the right to use land plots located on islands, border or coastal areas, or other areas affecting national defence and security.

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 these foreign investors have not met their requirements based on their view. The Law on Investment, effective on 1 January 2021, expressly stipulates the investment policies relating to national defence and security for considering and approving transactions conducted by foreign investors.

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; these foreign investors should submit dossiers to register their investment projects with the proper authorities (eg, 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 that involve special-use forests, headwater protection forests or border protection forests of at least 50 hectares, of sand-fixing and windbreak coastal forests or protection forests for wave prevention of at least 500 hectares, or production forests of at least 1,000 hectares; investment projects involving the relocation of 20,000 or more people in mountainous areas or 50,000 or more in other areas; 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, runways of airports and aerodromes; international passenger terminals; cargo terminals of airports and aerodromes with a capacity of at least 1 million tons per year; certain significant seaport projects; petroleum-processing projects; projects having gambling (except for prize-awarding electronic games for foreigners); residential housing and urban area projects that use at least 50 hectares of land or less than 50 hectares of land but with a population of at least 15,000 people in an urban area, or that use at least 100 hectares of land or less than 100 hectares of land but with a population of at least 10,000 people in a non-urban area, or projects regardless of the area of land used or population within the safety perimeter of relics recognised by the competent authority as national and special national relics; industrial or export processing or economic zone projects; projects of foreign investors in telecommunication with network infrastructure, afforestation, publications and the press; projects falling into in-principle approvals of two or more provinces; 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; golf course projects; residential housing and urban area projects that use at least 50 hectares of land or less than 50 hectares of land but with a population of at least 15,000 people in an urban area, or that use at least 100 hectares of land or less than 100 hectares of land but with a population of at least 10,000 people in a non-urban area, or projects regardless of the area of land used or population within a restricted development area or within a historic inner area (determined in accordance with urban area planning projects) of a special urban area; and projects implemented on islands or in border or coastal communes; in other areas affecting national defence and security.

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 (1) Vietnam's WTO commitments and other international or bilateral treaties of Vietnam; and (2) 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: Under the Law on Investment, 'national defence and security' is one of the key factors in considering foreign investment activities, including both issuing an investment registration certificate for a new investment project or approving M&A transactions. It is expected to have certain impacts on foreign investment in Vietnam, especially in real estate and energy projects.
- 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: the combined market share of the participating companies; the level of concentration in the relevant market before and after the economic concentration; and 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.

- 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, 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.

- 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; acquisitions of a Vietnam-based company that lead to foreign ownership in this Vietnam-based company exceeding 50 per cent of shares or equity; or acquisition of a Vietnam-based company with the right to use land plots located on islands, border or coastal areas, or other areas affecting national defence and security.

If the foreign investors have not obtained these approvals for their acquisitions, they would not be officially recorded as a new member or shareholder of the Vietnam-based company, as 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, this guidance is non-binding and in some worst-case scenarios this guidance may be different from what is ultimately applied to the foreign investors' investment.

- 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?

Generally, 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.

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 that the authorities declare the merger contract invalid. In addition, there are other cases where the investment project is forced to be terminated and its investment registration certificate or enterprise registration certificate is revoked because of false information, or the licensing authority finds that the investment project was made through a sham transaction (eg, nominee arrangement) in accordance with civil law.

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?

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 (1) Vietnam's WTO commitments and other international or bilateral treaties of Vietnam; and (2) 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: Under the Law on Investment, 'national defence and security' is one of the key factors in considering foreign investment activities, including both issuing an investment registration certificate for a new investment project or approving M&A transactions. It is expected to have certain impacts on foreign investment in Vietnam, especially in real estate and energy projects.
- 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: the combined market share of the participating companies; the level of concentration in the relevant market before and after the economic concentration; and 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.

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 process as consulting parties for the authorities in charge to make a 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, the authorities can prohibit the consummation of the transaction and refuse to issue an investment registration certificate or approval for the foreign investment. In the case of antitrust, if the foreign investors ignore this 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.

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 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 this 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 a foreign direct investment (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.

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UPDATES 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 1 January 2021, three new major laws governing business investment activities in Vietnam take effect, including the new Law on Enterprises No. 59/2020/QH14, Law on Investment No. 61/2020/QH14 and Law on Securities No. 54/2019/QH14. These new laws will certainly have various impacts on most investment activities in Vietnam for both local and foreign investors. One of the key changes is the stipulation of national defence and security as one of the key factors for considering and approving a foreign investment project or M&A transaction. Vietnam's government will soon issue legislation to further guide the implementation of these new laws. However, as a matter of practice, a gap should be expected between when the new laws take effect and when the guiding legislation is issued. In this case, the government may provide some temporary guidance to handle ongoing matters, but there will probably be some delays in the filing and review process of new applications by foreign investors during the waiting time.

Coronavirus

- 25 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

With swift and decisive action from the government and good compliance from the public, Vietnam's covid-19 response was widely hailed as one

of the best in the world, helping to limit the pandemic's impact on public health and the economy. Short-term emergency measures and relief programmes were implemented in March and April, but have generally expired before the end of the year. By September 2020, everyday life and business in Vietnam had largely returned to near-normal, with the exception of international travel and the tourism industry.

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