

AMCHAM VIETNAM LEGAL COMMITTEE

SUBMISSION ON THE DRAFT DECREE DETAILING THE 2014 LAW ON INVESTMENT

As at 10 April 2015

1 General comments

The Draft Decree has detailed some of important points in the Law on Investment 2014 (**2014 LOI**). Nevertheless, it does not completely clarify some issues raised from the 2014 LOI, which, in our view, would cause significant difficulties in practice.

One area where the Draft Decree can be improved is in respect of the process for issuance of investment registration certificate (**IRC**) and enterprises registration certificate (**ERC**). It has been the business community's expectation from the consultation process with the MPI on the 2014 LOI that implementing regulations would try to minimise the administrative burden for foreign investors due to the splitting of the old investment certificate (**IC**) into two separate IRC and ERC under the new law. This could be done by having the foreign investors only submitting one application dossier to the licensing authority and there will be internal transfer between different departments in the authority in order to provide to the investor at the end of that process both the IRC and the ERC required for their project. This is not reflected at all in the Draft Decree and we strongly submit that the Government should carefully and thoroughly consider the design of this process to achieve the original objective of the 2014 LOI, that is, to simplify the investment registration regime and make it easier to do business in Vietnam.

We also have a number of other comments set out in the table below and sorted in ascending order of the relevant provision in the Draft Decree.

2 Our opinions on some of the main issues of the Draft Decree implementing the 2014 Law on Investment

No.	Draft Decree Reference	Issues	Recommendation
1.	6	<p>Pursuant to Article 6, application dossiers for investment projects submitted to the authority must be in Vietnamese; in case there are some documents in foreign languages, the investor must submit the <u>original document</u> in the foreign language.</p> <p>It is unclear what are the requirements for the original foreign documents, whether they need to be legalised with the relevant embassy/consulate or whether it is sufficient to have it certified true and correct copy by an independent lawyer/notary officer. We further note that in certain cases, it is not possible for the investor to submit the original document but only certified true copy of the original document and the Implementing Decree should specifically permit that.</p>	<p>The Implementing Decree should set out in details the requirements for the original foreign documents in application dossiers.</p>

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2.	9.1, Schedule 3	<p>Article 9.1 and Schedule 3 provide a detailed list of conditional business lines and business investment conditions for foreign investors.</p> <p>While this may be a good intention to make it easier for foreign investors when considering their business lines, we are concerned that discrepancies may arise between Schedule 3 list and other industry specific laws, in which case it will cause great anxiety to foreign investors in order to work out which conditions they need to comply with. The 2014 LOI also does not envisage that any separate list will be provided for foreign investors but all business investment conditions will be published on the National portal for enterprises registration (National Portal). Under Article 9.5 of the Draft Decree, foreign investors will still have to go to the National Portal after consulting the conditions in Schedule 3 list to see whether there are other conditions applicable for their business.</p>	<p>We suggest Article 9.1 and Schedule 3 list should be removed in the Implementing Decree to reduce the risk of any discrepancy between different laws and lists in the future. In practice, all business investment conditions should be published on the National Portal and the authority can make information on the National Portal more friendly to the foreign investors by having a separate table or make it easy to search by key words for all those conditions and business lines that are only conditional for foreign investors.</p>

No.	Draft Decree Reference	Issues	Recommendation
3.	19	<p>Article 19 provides conditions and procedures for applying investment incentives, in which Article 19.3 sets out the starting date for project implementation in respect of those investment projects that do not have an IRC (as it is not required) to record the relevant investment incentives. It is not clear why Article 19.3 is necessary and in any event it may not be appropriate for the Implementing Decree to specify the starting time in this case because each respective authority providing investment incentives may have their own law specifying when the investment incentives will start to apply. Further, paragraph (c) of Article 19.3 refers to "the date of decision on investment of the investors" which is not clear enough and ambiguities can still arise in specific cases, such as when the issuance date of the investor's resolutions differs from the date of the General Meeting of Shareholders.</p>	<p>We recommend removing item (3) in Article 19 and leaving it to the relevant authority providing investment incentives to specify the starting date when incentives will apply. If Article 19.3 was to be kept, clearer indication of timing should be provided in paragraph (c).</p>
4.	26.1	<p>Article 32.1(a) of the 2014 LOI regarding the authority of Provincial People's Committee on in-principal approval states that:</p> <p><i>"Projects to which the State allocates or leases out land without auction, tendering or transfer; and projects with a requirement for conversion of the land use purpose."</i></p> <p>It is not clear in reading the law whether the word 'transfer' in this case refers to State allocation or lease of land without a transfer. We understand that 'transfer' in this case refers to a project using land acquired by way of transfer from another existing land user (not the State) under the Land Law.</p> <p>The Implementing Decree should clarify this but Article 26.1 of the Draft Decree just refers back to Article 32 of LOI without any clarification.</p>	<p>We propose Article 26.1 of Draft Decree should be amended as follows:</p> <p><i>"1. The authority to decide in-principal approval of the Provincial People's Committee is regulated at Article 32 of Law on Investment.</i></p> <p><i><u>Projects to which the State allocates or leases out land by way of auction, tendering or project using land acquired by way of transfer from existing land user do not need to go through the process of in-principal approval of the Provincial People's Committee.</u></i>"</p>

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5.	26.3	<p>Pursuant to Article 26.3, the investor shall submit 06 dossiers to the investment registration agency of the locality in which the project shall be implemented. In case of irregular dossiers, the investment registration agency shall send notification in writing to the investor within 3 working days from the date of dossiers receipt.</p> <p>This provision does not clarify whether the investors could assume that their dossiers are accepted if the investment registration agency does not send any written notification after the 3 working day period expires.</p>	<p>Article 26.3 may be clarified as follows:</p> <p>"The investor shall submit 06 dossiers to the investment registration agency of the locality in which the project shall be implemented. If the dossier does not conform with requirements in the law, <u>the investment registration agency must notify the investor in writing within 3 working days from the date of their receipt of the dossier in order for the investor to amend or update the dossier. The investment registration agency must not request the investor to amend or update their dossier after 3 working days from the date of their receipt of the dossier.</u>"</p>

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6.	34.1 and 34.2.d	<p>Under Article 34.2.d, in case the request for the issuance of IRC associated with the establishment of an economic organisation, the written request for issuance of IRC must provide the information of charter capital and capital contribution ratio.</p> <p>However, the provisions does not specify whether the 'capital of the project contributed by the investor' must be equal to the initial charter capital of the FIE at the time of establishment and whether this capital can be contributed over a period longer than 90 days prescribed under the Law on Enterprises.</p> <p>For example, the investment capital of the project is \$100 of which \$40 is capital contributed by the investor and \$60 is borrowed. Does the FIE need to have \$40 as its charter capital at the time of its establishment or can the FIE have a lower initial charter capital (e.g. \$10) which the investor will contribute within 90 days and the rest \$30 will be contributed as increased charter capital of the FIE later on? In another word, will the investment licensing authority accept that the initial charter capital of the investment project will be less than 15-20% of the total investment capital (in this example it is only 10% and in real life, could be much lower as investors, especially those in large-scale investment projects, would not want to pump too much cash into the project company at the initial stage when there is no operating or construction activities to be occurred?). We understand that although it is not written, the 15-20% ratio requirement is often used by the authority in deciding whether to approve an investment project in practice.</p>	<p>There is a typo mistake as Article 34.1 should refer to the 2014 LOI, not "this law".</p> <p>The Implementing Decree should explicitly recognise that FIEs may have an initial charter capital that is lower than the total capital to be contributed by the investors (e.g. \$10 vs \$40 in our example here). This could be made clear at Article 32.2(d) by providing that the required information includes "explanation regarding charter capital and capital contribution ratio, <u>including any schedule for contribution of charter capital and any other schedule for contribution of investment capital over the life of the project.</u>"</p>

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7.	35.1	<p>Article 35.1 of the Draft Decree provides that: "The investment registration agency shall issue an IRC to the investor within a time-limit of five working days from the date of receipt of the written decision on the investment policy", which is more or less the same as regulated in the LOI.</p> <p>In our view, the implementing regulations should make it clear that the IRC will be issued by the licensing authorities <u>automatically</u> within 5 business days after an in-principle approval for the project has been issued – i.e. the foreign investor does not need to re-submit any application file for the IRC.</p>	<p>Article 35.1 should be supplemented as follows:</p> <p><i>"1. [...] <u>The investor shall not be required to submit any additional dossier to receive the IRC after the in-principle approval for the project has been issued</u>".</i></p>
8.	38.1	<p>Article 38.1 of Draft Decree states that when investing by way of acquisition of capital contribution or shares of an economic entity (M&A), the foreign investors do not need to apply for the IRC. However, it is not clear if the target company still has to go through the procedure to apply for IRC for their existing investment projects after completion of the M&A transaction.</p> <p>This is because from the wording of Article 36.1.(b) of LOI, a target company with the total foreign ownership after completion of the M&A transaction exceeding 51% will be subject to the IRC procedure for their investment projects and this could be interpreted that they will need to apply for IRCs for all of their investment projects including those that they have already had or have been carried out before the foreign investors acquires the target .</p>	<p>The Implementing Decree should clarify this uncertainty and it is recommended that no IRC will be required for the target company. When a foreign investor submits their application dossier for the M&A approval, the licensing authority will have checked the required conditions of the foreign investors and the target company before issuing an approval for the M&A transaction to process. Therefore, an additional IRC for the target company is not necessary.</p> <p>Article 38.1 should be amended as follows:</p> <p><i>"[1. ...] In this case the investor <u>and the target company</u> do not need to conduct the procedure for issuance of Investment Registration Certificate."</i></p>

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9.	39.1	<p>Article 39.1 of Draft Decree states that:</p> <p><i>"The dossier, procedure to register the capital contribution, share purchase in economic organization will be implemented as regulated at clause 2 and 3 of Article 26 of LOI."</i></p> <p>As clause 2 and 3 of Article 26 of LOI is not clear on required dossier, article 39.1 should make it clear whether a copy of the acquisition agreements or an evidence of payment of the purchase price by the foreign investor will be required as a part of the registration file. From the wording of Article 39.1 of Draft Decree and Article 26.2 of the 2014 LOI, we think that there is no such requirement.</p>	<p>Article 39.1 of Draft Decree should be amended as follows:</p> <p>"39.1 The dossier, procedure to register the capital contribution, share purchase in economic organization will be implemented as regulated at clause 2 and 3 of Article 26 of LOI. <u>Besides the required documents in Article 26.2 of LOI, the foreign investors do not need to submit any other documents.</u>"</p>
10	39.2	<p>Article 39.2 of Draft Decree states that the Department of Planning and Investment will issue a notice regarding the registration of capital contribution, share purchase in economic organization. However, it is not clear under the Draft Decree which division of the DPI will have such authority (i.e. foreign investment division or the business registration division). We propose that the foreign investment division will have the authority to review the registration as the registration relating to foreign investors.</p>	<p>Article 39.2 of Draft Decree should be amended as follows:</p> <p>"39.2 <u>Foreign investment division of the</u> Department of Planning and Investment issues the notice[...]"</p>

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11	40.1	<p>Pursuant to Article 40.1, within 30 days from the date of issuance of IRC, foreign investors shall perform procedures for registration of economic organizations establishment.</p> <p>As noted in our general comment, we are of the view that foreign investors should not be required to perform any additional procedures to register the new FIE but this process could be handled automatically and internally between the foreign investment offices and the business registration offices of the relevant DPI.</p> <p>Further, if another application dossier is required, the duration of 30 days can be insufficient especially in the case where the foreign investors are required to provide consular legalization of the foreign documents.</p>	<p>We recommend removing Article 40.1 and the Implementing Decree should specify clearly that foreign investors can receive the ERC for their FIEs automatically within a reasonable amount of time after the issuance of their IRC.</p> <p>If a separate application dossier for ERC is required, foreign investors should have sufficient time or should not have to provide any renewed or additional documents from those already provided in the IRC application dossier in order to obtain the ERC.</p>
12	41	<p>Article 41 only clarifies the exceptions where an investor does not need to provide an escrow deposit for the performance of the investment project.</p> <p>However, the implementing regulations do not specify the procedure for paying and refunding the performance bond as required under the 2014 LOI.</p>	<p>We recommend that the Draft Decree should regulate the procedure for making the escrow deposit and for refunding the performance bond – e.g. time, method to calculate the deposit, the sum of money refunded at different stages regarding the schedule of the investment project, etc.</p> <p>The Decree should also regulate all circumstances the escrow deposit shall not be refunded.</p>

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13	54.1	<p>Pursuant to Article 54.1, "economic organizations conducting investment projects" must submit a report to the investment registration agency and the local statistics agency every month with very detailed information about the progress of the investment projects.</p> <p>We have significant concerns that this is an unduly onerous reporting obligation on the companies, primarily FIEs, and a duplication of many other types of reports that FIEs have already had to do otherwise with the Tax Department, Customs or Department of Labour, Invalids and Social Affairs.</p>	<p>The economic entities should not be required to provide monthly reports and for statistical purposes, the investment authority and statistics agency can obtain such information from the relevant government agencies. If it is necessary for the investment licensing authority to monitor the progress of the investment project implementation, we suggest that annual reports or half-yearly reports should be adequate for such purpose.</p>
14	72.1	<p>Pursuant to Article 72.1 of Draft Decree, FIEs with IC are entitled to continue their activities under the issued IC and the old Charter.</p> <p>It is unclear whether this provision is also applicable to companies that did not register to operate under the Law on Investment 2005.</p>	<p>Modification is needed to avoid contradiction between Law on Enterprise and Law on Investment.</p> <p>It should also make clear whether non-re-registered companies under Law on Investment 2005 is entitled to continue implementing without any further procedures.</p>
15	75, 77	<p>Articles 75 and 77 provide the transitional provisions for investors if they want to amend an existing IC for changes in the investment project and in the FIEs respectively. Accordingly, new IRC or new ERC will be issued with all the amended and unchanged contents but there is no mention if the new IRC or ERC will replace the existing IC wholly or partly. It will also be practically confusing if the old IC is not replaced in whole but only partly and investors have to maintain partly valid pre-2014 law document (IC) and post-2014 law documents (IRC and ERC).</p>	<p>We recommend that while it is not compulsory for companies operating under an IC to take any step to convert it into the new documents, if there is any request for amendment of the existing IC like in these cases, the authority should just take this opportunity to replace all pre-2014 law documents (IC, investment licences) with the new IRC and ERC for conformation with the 2014 LOI and easier administration in the future.</p>