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CONDITIONAL BUSINESSES WHICH WAY TO GO?

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Law on amending the List of conditional businesses and investments



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- Law on Investment 2014 (LOI) took effect on 01/7/2015. List of conditional businesses was specified in the Appendix 4.
- The new PM proposed 2016 to be “year of the enterprise” and reduce redtape by asking to amend Law on Investment, Law on Enterprises, Law on Construction, Law on Land, Law on Real Estate Businesses.
- But Art 74.3 LOI noted that conditions not complied with LOI will be replaced.
- On 9/11/2016, after one year of implementation, Government proposed to Congress the Draft of Law on amending the List of conditional businesses of the Law on Investment 2014.
- The current list is at <https://dangkykinhdoanh.gov.vn/vi-vn/danhm%E1%BB%A5cng%C3%A0nhngh%E1%BB%81%C4%91%E1%BA%A7ut%C6%B0kinhdoanh.aspx>

Details of amendment

27

- Eliminated 27 conditional businesses

15

- Added 15 new conditional business

29 in 19

- Unified 29 conditional businesses in 19 conditional businesses

18

- Updated and clarified name of 18 conditional businesses

27 conditional businesses eliminated

Not satisfy the provision regulated in Article 7 of the Law on Investment 2014

- For example: Service on establish and examine the construction project ; Association with foreign vocational training institutions and foreign-invested vocational training institutions in vocational training at intermediate and college levels;...

Can be governed by Technical Regulations and Standards instead of the law

- Import radio transmitters and transceivers; Trading on fishing instruments;...

Impractical and unreasonable

- Trading on firewood from timber or from Vietnam's natural forests; Tissue bank services;...

15 conditional businesses added

The conditional businesses have been specified in other laws

- For example: Apartment building management and operation which has been specified in Law on Housing 2005 and Decree no. 71/2010/ND-CP; and The operation on examining education quality, which has been specified in Law on Education 2009; ...

The business recently arisen and need to be governed by the conditions.

- Construction experiment service; Trading on record, locate and camouflage equipments;...

Details of amendment

- The decrease in the number of conditional businesses is inappreciable, can not make an incentive.
- The supplement of 15 new conditional businesses is not totally comply with the regulation in Article 7 of the Law on Investment:

“Conditional business lines are the business lines in which the investment must satisfy certain conditions for reasons of national defense and security, social order and security, social ethics, or public health”

Impact on greenfield projects

Obstacles in defining the detail conditions of businesses

- The conditions of businesses are straggly specified in the Laws, Ordinances, Decrees, and international treaties.
- For example: The conditions of “Oil and gas trading” business are specified in: (i) WTO, FTAs, ACIA ; (ii) Decree no. 23/2007/ND-CP; (iii) Decree no. 83/2014/ND-CP; and other Technical Regulations and Standards.

Impact on amended projects

Obstacles in satisfying the conditions

- There is no difference between “conditional businesses” and “conditional projects”.
- Some of conditional businesses have not specified the detail conditions even if they have been listed.
- In some circumstances, the conditions are qualitative and ambiguous, e.g., trading conditions.
- Beside the conditions of businesses in general, foreign investors are also obligated to comply with the condition in 46 businesses specified for them.
- See <https://dautunuocngoai.gov.vn/fdi/nganhcap3chitiet/60>

Impacts on M&A or IC projects

Obstacles in amendment of IC projects

- It is unclear the difference between “amendment of investment purpose” and “amendment of scope of business”
- IC or IRC also name the investors and legal rep. Therefore when there was M&A or change of legal rep., there is a need to amend the IRC.
- Although Decree 118 already stated that operating company will become the investor, this concept is contrary to the definition of LOI
- As a consequence, IC projects do not enjoy the change under the new LOI or LOE.

Impacts on Project Transfer

Obstacles in amendment of IC projects

- It is unclear the difference between “amendment of investment purpose” and “amendment of scope of business”
- IC or IRC also name the investors and legal rep. Therefore when there was M&A or change of legal rep., there is a need to amend the IRC.
- Although Decree 118 already stated that operating company will become the investor, this concept is contrary to the definition of LOI
- As a consequence, IC projects do not enjoy the change under the new LOI or LOE.

“Innovative” solutions?

Holding company?

- The concept is recognised under LOI and LOE.
- Problem of lack of complete control.
- SHA? Careful while dealing with SOE or equitized enterprises
- What happened when a company “become” FDI again?

Nominee?

- Finally recognized under usus fructus of Civil Code 2015?
- Feasible structure?

Public vs. non public company?

- No restriction on business conditions for public companies, except under Securities Law?
- What happened if the public company not registered at SSC?

Solutions

Before implementing a project

- Research on the current regulations of law and the change thereof.
- Understand the detail conditions of the intended businesses to arrange the necessary factors regarding capacity, experience and technology,.... Occasionally, investors should be consulted.

During the establishment of the project

- Understand the regulations regarding applicable procedures.
- Keep contact with related agencies.

After completing the M&A

- Continuously conduct audit to maintain the satisfaction.
- Timely update the change of the applicable laws.

Q & A



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