

LEGAL UPDATE

DRAFT DECREE TO IMPLEMENT NEW LAW ON INVESTMENT

The 2020 Law on Investment (**2020 Lol**) was adopted by the National Assembly on 17 June 2020 and will come into effect on 1 January 2021. Pursuant to the 2020 Lol, the Government has been assigned to provide details of and guidance on several contents of the law. For this purpose, the Ministry of Planning and Investment has recently published a draft decree providing detailed regulations and guidance for implementation of a number of articles of the 2020 Lol (**Draft Decree**), which will abolish Decree No. 118/2015/ND-CP (**Decree 118**) providing detailed regulations and guidance for implementation of a number of articles of the 2014 Law on Investment (**2014 Lol**).

In this update, we would like to set out some of the remarkable points of the Draft Decree for your information. Please read also our general [update on the approved 2020 Lol](#).

1. Business Investment Guarantees

Currently, the 2014 Lol provides for several forms of Government's guarantees for business investment activities of foreign investors, which are set out in various articles of the 2014 Lol, e.g. guarantee for satisfaction of foreign currency demand for investment projects, guarantee for performance of contractual obligations of competent State authorities or State-owned enterprises involving in implementation of investment projects, etc.

However, the 2020 Lol only provides that the Prime Minister may decide to apply forms of the Government's guarantee for implementation of certain important investment projects depending on the socio-economic conditions and demand for investment attraction from time to time, and assigns the Government to provide details of this provision. It is therefore unclear under the 2020 Lol whether the forms of the Government's guarantee applicable under the 2014 Lol would be continuously applied under the new law.

The Draft Decree now provides further guidance on the forms of the Government's guarantee for business investment activities mentioned in the 2020 Lol, which include:

- guarantee or support for balancing foreign currency;
- guarantee for performance of contractual obligations by a competent State agency and State enterprise;
- other forms decided by the Prime Minister at the proposal of Ministries, Ministerial-level agencies, and Provincial People's Committees.

The provision of these forms of the Government's guarantee in a single Article (instead of provision in various articles as in the 2014 Lol) will facilitate the interpretation and application thereof. As a consequence, the Government's guarantees are expected to be understood more consistently and applied more efficiently.

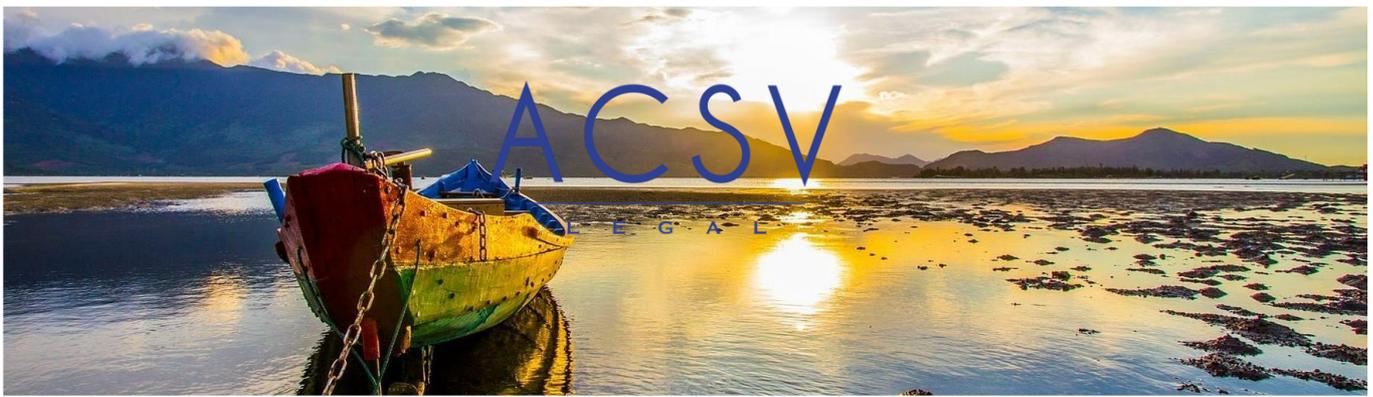
In addition, the Draft Decree further provides for the procedures for application of the aforesaid forms of business investment guarantees. Accordingly, the Prime Minister shall, based on written proposals of investors and/or requests of ministries, ministerial level agencies or provincial people's committees (as the case may be), consider and decide to apply appropriate forms of guarantee and designate (an) appropriate competent authority(ies) to negotiate and execute with the investor an agreement on guarantees for implementation of the project.

2. Market Access Conditions Applicable to Foreign Investors

2.1 Restricted Business Sectors: prohibited or conditional

The most notable point in this Draft Decree is the introduction of a list of business sectors where market access is not yet allowed for foreign investors, and a list of business sectors where market access is conditional. The 2 lists are currently included as Appendix I to the Draft Decree. Note however, that the lists are not exhaustive and there is still a strong debate going on with contrary opinion streams.

In general, the lists are based on WTO commitments and cover the following. One list is for business sectors where market access is not yet allowed, such as but not limited to:



- sectors where the law of Vietnam and international treaties on investment do not allow foreign investors to invest and conduct business activities,
- sectors affecting national defence and security, and
- government monopoly sectors.

The other list is for conditional sectors and includes sectors where foreign investors are subject to discrimination pursuant to international treaties on investment and the law of Vietnam.

2.2 Principles for Application of Market Access Conditions

2.2.1 Negative List

The Draft Decree specifies the application of business sectors and market access conditions to foreign investors according to a so-called “negative list” approach. Accordingly, foreign investors are entitled to the same market access conditions as applicable to domestic investors, except for the cases prescribed in the list of restricted sectors. With the new approach, it could be time-saving for both foreign investors and licensing authorities in determining and appraising investment proposals and applications for registration of an M&A approval.

With regard to business sectors for which Vietnam has not yet made any commitment under international treaties on investment and for which the law of Vietnam does not yet have provisions on discrimination against a foreign investor, the foreign investor can apply the market access condition in the same way as a domestic investor. It will no longer be required to obtain an opinion from the Ministry of Planning and Investment and relevant other ministries for its consideration and decision.

2.2.2 Most Favourable Market Access Conditions

A new provision is that when a foreign investor is subject to an international treaty on investment and the market access conditions applied to such foreign investor thereunder are more favourable than that of Vietnamese law, the foreign investor shall be allowed to apply the market access conditions prescribed by the international treaty. This regulation is expected to play an important role in attracting the foreign investors.

3. Investment Incentives

The Draft Decree includes a list of business sectors entitled to investment incentives in Appendix II thereto and a list of geographical areas entitled to investment incentives in Appendix III thereto. It is important to note that in comparison with Decree 118, the list of business sectors entitled to investment incentives adds some sectors in relation to information technology, electronics, mechanical products, production of materials, environmental protection, innovative start-up investment. Some examples are:

- production of cyber information security products;
- production of science and technology product;
- production of light unburnt building materials;
- investment in the use of waste heat and exhaust gas for power generation of construction production establishments; and
- investment in the process and use of wastes from power plants, chemical fertiliser plants and metallurgical plants as construction materials.

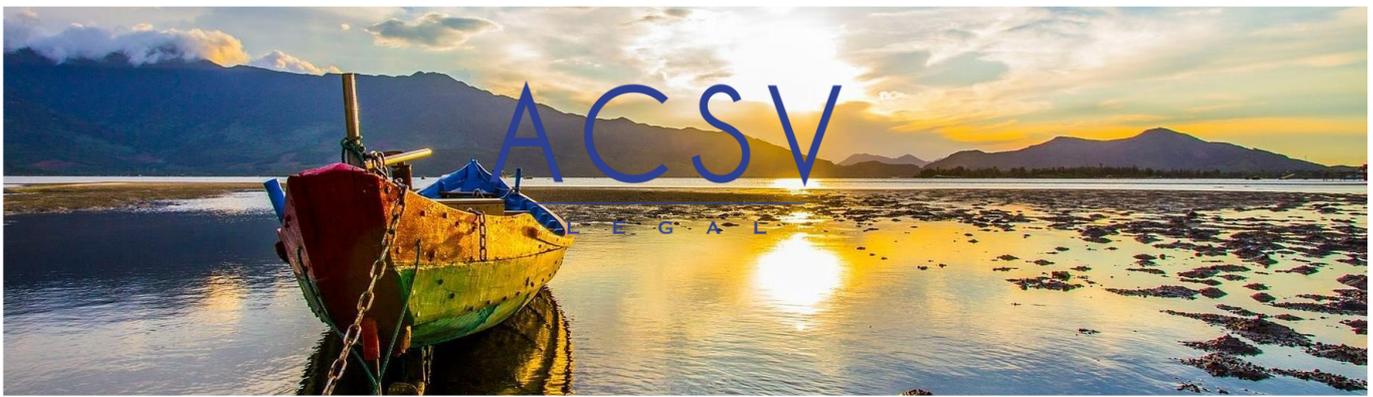
It shows that Vietnam strongly encourages investment in high-tech, information technology sectors to ensure cyber-information security in Vietnam as well as waste-treating sectors in order to protect the environment and boost energy efficiency.

4. Escrow Deposit for Implementation of Investment Projects

The Draft Decree updates and supplements provisions for escrow deposits for the cases in which it is not required to have an escrow deposit, the time of escrow deposit, the escrow account, the bank guarantee, and cases of postponement of escrow obligations. Important to note is that the investor will be entitled to postponement of performance of the obligation to provide an escrow deposit if there is a bank guarantee provided by a credit institution licensed to operate in Vietnam that the credit institution will pay the amount corresponding to the escrow amount within 30 days from the date of receiving the request from a State authorities. This addition plays a part in reducing the waste of social resources as well as lower investment expenses for investors.

5. Investment Policy Approval and Investor Selection

Under Decree 118, subject to the nature and scale of each investment project, the investor may need to apply for



investment policy approval to the project. In case the investor wins an auction of land use right or bidding for an investment project using the land under the procedures of the Law on Land, Law on Bidding and other relevant laws, the investor shall not be required to carry out procedures for investment policy approval.

However, the Draft Decree sets out the applicable principles and the relationship between procedures for investment policy approval, investor selection and investor approval. Accordingly, the investor shall still be required to carry out the procedure for investment policy approval even in case an auction of land use right or bidding for an investment project is required. In particular, the competent authorities will approve the investment policy and:

- assign the competent authorities to organise the investor selection according to the form of land use right auction or investor selection bidding; or
- approve concurrently the investor in case no auction of land use right or bidding for an investment project is required.

The procedures under the Draft Decree might seem more complicated in comparison with Decree 118, but it is believed that the change would facilitate the competent authorities in controlling and granting investment projects as well as create consistency in investment procedures.

6. Amendment of Investment Projects

It happens that during the process of implementing investment projects, enterprises may divide or merge projects to restructure management activities, improve implementation efficiency, or reduce business costs.

To cope with this, the Draft Decree adds provisions on conditions and procedures for amendment of investment projects in case of transfer of the entire or part of investment projects, merger, division or separation of projects. The Draft Decree also stipulates procedures for amendment of investment project in case the investor uses the land use right or assets on the land being part of the investment project to contribute capital to establish an enterprise or to conduct business cooperation. These provisions create a legal framework to allow foreign investors to implement the investment in accordance with the laws.

7. Façade Transaction and Termination of Investment Project

Under the 2015 Civil Code, a facade transaction is understood as a transaction established by the parties to conceal another transaction. The 2020 Loi allows the licensing authorities to terminate the operation of an investment project in case the investor conducts the investment activities on the basis of a façade transaction. To address, the Draft Decree introduces specific regulations where the licensing authorities can terminate an investment project pursuant to a written certification of the competent authorities on façade transaction.

However, it is not clear yet whether the written certification on façade transaction is issued by the court or another authority. It is expected that the final Draft Decree will provide more details on this.

8. Expected Entry into Force

The Draft Decree is expected to come into effect on 1 January 2021. However, as – unfortunately – is often the case it might be 1-2 months later. Therefore, investors should be aware of the lack of implementing regulations in the transitional period, which can result in prolonged investment procedures.

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