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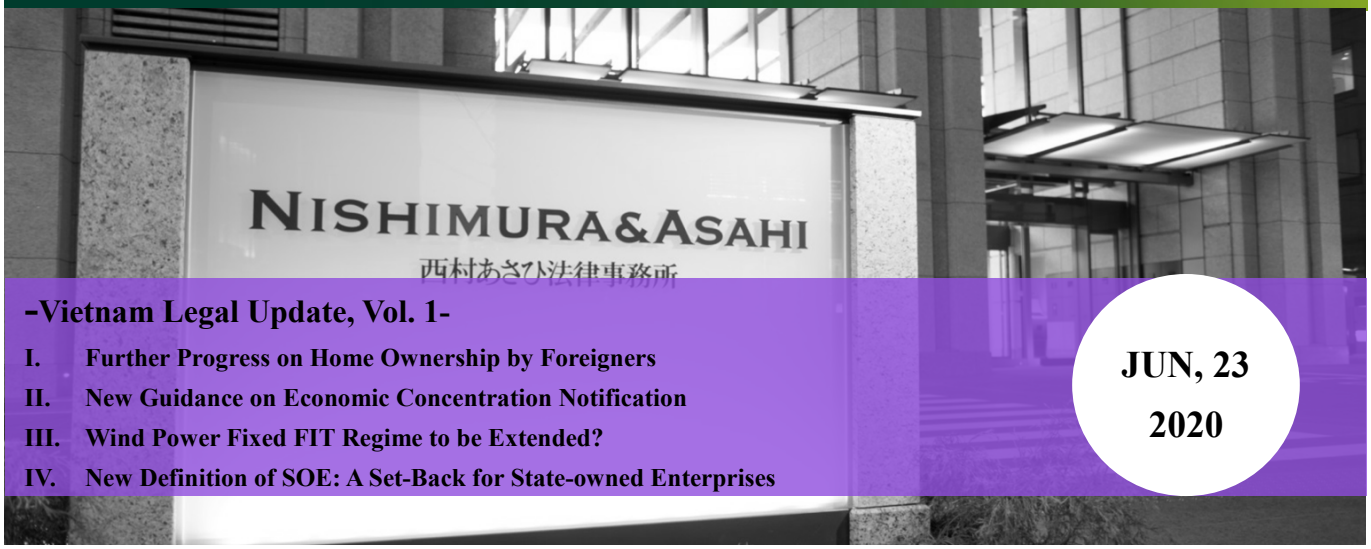
Asia Newsletter



-Vietnam Legal Update, Vol. 1-

I. Further Progress on Home Ownership by Foreigners
II. New Guidance on Economic Concentration Notification
III. Wind Power Fixed FIT Regime to be Extended?
IV. New Definition of SOE: A Set-Back for State-owned Enterprises

JUN, 23 2020

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I. Further Progress on Home Ownership by Foreigners

Vu Le Bang, Cao Tran Nghia

Under the 2014 Law on Residential Housing, foreign organizations and individuals are permitted to own homes that are part of residential housing construction projects, except in areas reserved for ensuring national defense and security. However, due to protracted deliberation over the process for determining the permissible areas and projects, issuance of home ownership certificates to foreigners has remained mostly suspended throughout Vietnam until recently when the relevant state authorities finalized and publicly announced the areas and projects eligible for home ownership by foreigners.

Specifically, on May 15, 2020 and again on June 2, 2020, the Hanoi City Department of Construction announced that an additional 32 residential projects will become eligible for ownership by foreign organizations and individuals. Da Nang City has also recently announced both a list of projects in which home ownership by foreign organizations and individuals is allowed in addition to a list of projects in which foreign organizations and individuals are not allowed to own homes for national security purposes. Such promulgation by the provincial authorities of residential projects eligible for ownership by foreign organizations and individuals is widely seen as a positive step forward and will enable the issuance of home ownership certificates to foreigners to proceed more smoothly in practice.

While the procedures and criteria to determine such lists remain confidential and appear to be subject to case-by-case appraisals through the efforts of provincial authorities and various state ministries, the recent updates to such lists by Hanoi City and Da Nang City continue to provide some welcomed guidance to foreign organizations and individuals regarding home ownership in those regions and may foreshow efforts by other regions to produce such lists.

II. New Guidance on Economic Concentration Notification

Phan Thien Huong, Tran Quoc Dat

Under Article 33 of the 2018 Law on Competition (the "**Competition Law**"), enterprises that participate in an economic concentration must submit a notification of economic concentration to the National Competition Committee ("**NCC**") prior to carrying out the transaction. However, because the NCC has not yet been established, there is no authority in place from which the enterprises can seek guidance or to which they can submit their notification. To resolve this inconvenience, the Ministry of Industry and Trade (the "**MOIT**") has issued guidance on the economic concentration notification procedures on its website (the "**Guidelines**").

Process to assess economic concentration dossiers

The Guidelines provide detailed procedures regarding the MOIT's assessment of economic concentration transactions as follows:

- *Step 1. Receipt of economic concentration dossier*. The enterprises participating in the economic concentration (the "**Applicants**") must submit an economic concentration dossier to the MOIT via the MOIT's online portal of public service, by post or in person at the MOIT. After receiving the dossier, the MOIT will forward such dossier to the Vietnam Competition and Consumer Authority (the "**VCCA**") for assessment.
- *Step 2. Assessment of completeness and validity of economic concentration dossier*. Within seven working days from the date of receipt of the dossier, the VCCA will assess the dossier and issue a written notice to confirm its completeness and validity. If not satisfied, the VCCA will issue a written notice specifying the contents to be amended or supplemented by the Applicants.
- *Step 3. Preliminary appraisal.* Within 30 days from the date of issuance of the written notice of Step 2, the VCCA will assess (i) the participating enterprises, (ii) the relationship between or among those enterprises, (iii) the form of the economic concentration, (iv) the relevant market, (v) the combined market share of the participating enterprises in the relevant market, and (vi) the extent of concentration in the relevant market before and after the transaction. The VCCA will then report the results of its assessment to the MOIT for issuance of a notice to either approve, or commence an official appraisal of, the economic concentration. The official response of the MOIT to the Applicants will be issued within no more than five days following its receipt of the VCCA's assessment.
- *Step 4. Official appraisal.* Within 90 days from the date of the MOIT's notice to carry out an official appraisal, which 90-day period may be extended by no more than 60 days, the VCCA will conduct an official appraisal to assess (i) the impact (or potential impact), whether positive or negative, of the economic concentration on Vietnamese society, (ii) measures to remedy any competition-restraining impact, or enhance any positive impact, of the economic concentration, and (iii) any conditions that may be imposed on the Applicants to mitigate any anti-competitive impact that may result from their transaction. The VCCA will then report the results of its assessment to the MOIT for issuance of a notice to either approve or prohibit the economic concentration and to make any recommendations to, or impose any conditions on, the participants to ensure fair competition in the market. Such notice will be issued by the MOIT to the Applicants within no more than 20 days following its receipt of the VCCA's assessment.

Form of notification of economic concentration

The MOIT has issued a new form of notification of economic concentration (Form TB-TKT), which includes four sections: (i) information on the Applicants, (ii) a description of the economic concentration, (iii) information on the threshold requiring notification of the economic concentration, and (iv) the expected timeline for implementation of the economic concentration. It remains to be seen whether the Guidelines will change once the NCC comes into being.

III. Wind Power Fixed FIT Regime to be Extended?

Ha Hoang Loc, Dinh Thi Hien Ly

Since the issuance of Decision No. 39/2018/QD-TTg of the Prime Minister on 10 September 2018 ("**Decision 39**"), which supplemented earlier law that was enacted to develop and encourage investment in wind power projects in Vietnam, investment in Vietnam's wind power sector has increased markedly[1].

Under Decision 39, the updated fixed feed-in tariff ("**FIT**") regime (onshore FIT: USD 0.085 per kWh; offshore FIT: USD 0.098 per kWh - taxes exclusive) is applicable for a period of 20 years to all or any part of the eligible on-grid wind power projects in Vietnam whose commercial operation date ("**COD**") is reached before 1 November 2021 (the "**FIT Application Deadline**").

However, the Ministry of Industry and Trade (the "**MOIT**") now recognizes that many wind power projects may be unable to reach COD and enjoy the fixed FIT regime due to various factors, including (i) a delay in the issuance of the regulatory guidelines for the Zoning Law; (ii) a delay in the delivery of supplies, such as turbines, equipment, etc., and deficiencies in human resources (namely, expatriates) due to the COVID-19 pandemic; and (iii), especially for offshore wind farms, overly complicated legal procedures.

To address these issues, the MOIT has issued Letter No. 2491/BCT-DL, dated 9 April 2020 ("**Proposal 2491**"), to the Prime Minister in which the MOIT proposes that the FIT Application Deadline be extended to 31 December 2023 and the MOIT be entrusted with the preparation of the specific FIT figures to be applied under the proposed deadline.

Accordingly, if Proposal 2491 is approved by the Prime Minister, wind power projects whose COD is reached later than the FIT Application Deadline but before 31 December 2023 will be entitled to a fixed FIT regime that is to be proposed by the MOIT and subsequently approved by the Prime Minister. Projects whose COD is before 1 November 2021 will remain entitled to the current fixed FIT regime under Decision 39. The FIT applicable to wind power projects having a COD after 2023 will be subject to competitive auction and bidding mechanisms.

IV. New Definition of SOE: A Set-Back for State-owned Enterprises

Ha Hoang Loc, Mai Thi Ngoc Anh

New SOE Definition

According to the 2015 Law on Enterprises (the "**LOE**"), a state-owned enterprise (an "**SOE**") is an enterprise 100% of the charter capital of which is held by the state. However, the latest draft LOE, which was submitted to the National Assembly in its 9th session for discussion on 21 May 2020 (the "**Draft Law**"), introduces a new definition of SOE, the apparent purpose of which is to, among other things, improve efficiency in the state's management, supervision, examination and control over its capital and assets invested in enterprises and enhance the corporate governance of SOE. Under the Draft Law, an SOE is an enterprise in which more than 50% of its charter capital or voting shares is held by the state. This new definition is much broader than the current definition and therefore encompasses a greater number of enterprises that are not SOEs under the current legislation (e.g., joint venture companies between the state and private investors or equitized former SOE enterprises in which the state holds more than 50% but less than

[1] *During the almost seven-year period in which the fixed FIT regime under Decision 37 was in place, there were only three projects (153.2 MW) constructed and put into operation. However, during the year and a half since the implementation of the current fixed FIT regime under Decision 39, 11 projects (377 MW) have been put into operation, 78 projects (4,800 MW) have been registered and approved to be incorporated into the power development master plan, 31 projects (1,662.25 MW) have signed PPAs and are planned to come into operation during 2020 and 2021, and 250 projects (45.000 MW) have been registered to be incorporated into the power development master plan and are pending approval.*

100% of the charter capital or voting shares). Those who have invested in a joint venture company with the state or who are planning to invest in an SOE should be aware of a number of changes under and side effects resulting from the Draft Law relating to SOEs that are unlikely to be universally welcomed.

Notable Changes Applicable to SOEs

1. Because of the expanded definition of SOE under the Draft Law, it will be possible for multi-member limited liability companies (LLCs) to be SOEs; and such SOEs and their subsidiaries[2] that are LLCs will be required to have an inspection committee under the Draft Law. As such, the corollary to the new definition of SOE will be the additional burden on a greater number of enterprises to establish and maintain inspection committees whereas under the current law they would not be required to do so.

2. General directors, members of the board of management and members of the inspection committee ("**Key Managers**") of an SOE or any of its subsidiaries will be subject to additional and stricter conditions regarding consanguinity. Specifically, no person who is the spouse, parent, child or sibling, whether by blood, adoption or law, of a manager of an SOE may serve as a Key Manager of such SOE's subsidiary. For existing enterprises that will constitute SOEs under the Draft Law, if a Key Manager of such SOE or its subsidiary does not satisfy such conditions, he or she will be entitled to hold such position only until the end of his or her current term of office.

Side Effects of New Definition of SOEs

Enterprises that will constitute SOEs under the Draft Law as a result of the broader definition of SOE will become subject to strict legal requirements that they would not otherwise be subject to under the current law. For example, managers of the existing enterprises that will constitute SOEs under the Draft Law may be required to resign from their current positions or make necessary divestments due to the prohibition on managers of SOEs against establishing and managing other enterprises in Vietnam. In addition, SOEs under the Draft Law will be obligated to disclose statutory information on both a regular and irregular basis.

In order to avoid application of the new definition of SOE to other laws and regulations, the Draft Law provides that the term "state-owned enterprises" referred to in certain enumerated laws will be replaced with the phrase "enterprises in which the state holds 100% of the charter capital", which is consistent with the current definition of SOE. Nevertheless, some laws, e.g., the Bidding Law and the Construction Law, among others, that include the term "state-owned enterprises" without being defined have been omitted. Thus, the new definition of SOE will likely have a far-reaching impact beyond the LOE. For instance, more enterprises will become subject to the statutory bidding procedure under the laws on bidding in connection with the selection of contractors for development and investment projects that are wholly or partly funded by SOEs. Similarly, more enterprises will be required to comply with the laws governing the execution and management of performance under contracts for construction projects that are wholly or partly funded by SOEs.

Finally, the state's divestment of SOEs to the private sector may become less attractive to investors. The continual change of the definition of SOE after every revision to the LOE continues to show inconsistency in the opinion of legislators, which, in turn, creates uncertainty and unpredictability for investors; and the legislative changes continue to trend toward tightening the state's control and supervision over SOEs. Moreover, given that a greater number of enterprises will fall within the definition of SOE and become subject to the complex regulations discussed above, the expense burden for compliance will proliferate.

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[2] *Subsidiaries of an SOE broadly include (i) enterprises more than 50% of the charter capital of which is beneficially held by the SOE, (ii) enterprises in which the SOE has the right to directly or indirectly appoint the majority of the board of management, the general director or the director of such enterprises, and (iii) enterprises in which the SOE has the right to decide amendments and additions to the charter of such enterprises.*

Contacts:

For any legal questions related to this newsletter, please contact Nishimura Asahi's Vietnam practice team at na_vnnl@eml.jurists.co.jp

Vu Le Bang — Vietnam Partner*, Ho Chi Minh City Office

Mr. Bang is a Vietnam partner specializing in inbound investments, corporate & commercial matters, M&A, banking & finance, real estate property & construction, and labor. Mr. Bang is a 2001 graduate of Hanoi University of Law (LL.B.), and received an LL.M. from the Transnational Law & Business University in Seoul, Korea in 2006. He is a member of the Ho Chi Minh Bar and the Vietnam Bar Federation, and is fluent in both English and Vietnamese.

Ha Hoang Loc — Vietnam Partner*, Ho Chi Minh City Office

Ha Hoang Loc is a Vietnam Partner with more than 12 years of post qualification experience in mergers and acquisitions, real estate, labor, finance and banking, antitrust, general corporate and all aspects of investment and licensing in Vietnam. Mr. Loc is a 2001 graduate of the Ho Chi Minh City University of Law (LL.B.), and received an LL.M. (with Merit) from Southampton Solent University (England) in 2008. He is admitted to the Ho Chi Minh City Bar Association (since 2008), and the Vietnam Bar Federation (since 2009). He is fluent in both English and Vietnamese.

Kazuhide Ohya — Partner, HCMC Office Representative

Mr. Ohya provides legal assistance in a broad range of areas in relation to foreign investment into Vietnam, including real estate, M&A, corporate, commercial, finance as well as labor matters. He is admitted to practice law in Japan (2004) and is registered as a foreign attorney in Vietnam (2013). Mr. Ohya also has experience in the public sector (serving as Deputy Director for the Financial Services Agency of Japan from 2011 to 2013). He graduated from Kyoto University (LL.B., 2003) and Duke University School of Law (LL.M., 2010).

* Please note that we are not engaged in a Gaikokuho Kyodo Jigyo (the operation of a foreign law joint enterprise).

Public Relations Section, Nishimura & Asahi
Otemon Tower, 1-1-2 Otemachi, Chiyoda-ku, Tokyo 100-8124, JAPAN
Tel: +81-3-6250-6202 Fax: +81-3-6250-7200 E-mail: na_vnnl@eml.jurists.co.jp URL: https://www.jurists.co.jp/en