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# Legal news

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## Foreign Investment

### Equitization of FDI enterprises

*... continued from previous issue*

The Ministry of Planning and Investment and the Ministry of Finance issued Inter-ministerial Circular 08/2003/TTLT-BKH-BTC dated 29/12/2003 on implementation of the government Decree 38/2003/ND-CP on transformation of FDI enterprises into joint stock companies. According to Circular 08, **the following foreign invested enterprises (FIEs) are not allowed to be transformed:**

- (i) FIEs in which parties or foreign investors committed to non-refundably transfer assets to the State of Vietnam and Vietnamese party;
- (ii) FIEs having incomes pre-collected such as those trading in infrastructure of industrial zones, export processing zones, new urban zones; construction of offices and apartments for lease, golf playing grounds, membership card selling services, etc.;
- (iii) FIEs investing under the form of BT, BTO or BOT;
- (iv) FIEs having the investment capital stated in the investment licence of over 70 millions and under 1 million USD;
- (v) FIEs having the accrual at the time of applying for transformation of or more than the owner's capital; and
- (vi) FIEs having the bad debts at the time of applying for transformation of more than the owner's capital.

FIEs wishing to be transformed **must submit application to the Ministry of Planning and Investment before 25 March 2004**. MPI's Consideration for transformation shall be completed before 25 May 2004.

Equitized FIEs shall still enjoy corporate income tax incentives, have responsibilities and rights in accordance with the Law on Foreign Investment in Vietnam and the investment licences.

Circular 08 has other guidelines on application dossier and procedures for application submission and consideration by the MPI. Circular 08 takes effect 15 days after the publication in the Official Gazette.

### FIEs' hire of management companies needs a new regulation

Foreign invested enterprises (FIEs) may hire other organizations to manage their enterprises in accordance with the Government's Decree No. 24/2000/ND-CP dated July 31, 2000 guiding the implementation of the Law on Foreign Investment in Vietnam (Article 30) and Inter-ministerial Circular No. 13/TTLB dated October 8, 1997 of the Ministry of Planning and Investment (MPI) and the Ministry of Finance. Circular 13/TTLB was issued to detail the obsolete Decree 12/CP dated February 18, 1997 which was replaced by Decree 24/2000/ND-CP, it is however still being in effect to govern the hire of management organizations by FIEs.

Since the date of issuance, thanks to well preparation and consultation with foreign law firms, management companies, FIEs, and international and regional common rules, Circular 13/TTLB has so far set up an enabling legal corridor for FIEs to hire management services.

However, through 5 years in implementation, Circular 13/TTLB has shown disadvantages and been outdated towards the current investment activities.

Firstly, Circular 13/TTLB and Decree 24/2000/ND-CP limit the business sectors that are allowed to hire management organizations, including hotel industry, offices and apartments for lease, golf courses, sports, entertainment, medical examination and treatment, education and training, and other fields of business which require intensive and professional management skills for which an enterprise requests to hire management. Furthermore, the management agreement (MA) must be registered with the investment licensing authority to be legally effective and enforceable.

The vague prescription of “other fields of businesses” in practice puts both FIEs and competent authorities in a difficult situation. Where FIEs’ business sector is not included in the aforesaid identified sectors, FIEs shall have to consult with the investment licensing authorities prior to official submission. Even in fact some investment licensing authorities could not respond FIEs and must further internally gather the MPI’s opinion. Those procedures waste time of FIEs.

Thus, many FIEs expressed their opinion to widen the identified business sectors which are allowed to hire management organizations towards entitling every FIEs be free to hire management organizations. The only restrictions that should be retained is that the hire must be based on the need for business management and the business efficiency, and there should be no change to or adversely affect on objectives of FIEs or the State’s interests.

Secondly, according to a recent seminar, another shortcoming of Circular 13/TTLB is the insufficiency in the guides on the contents of MAs. Circular 13/TTLB sets forth quite simple guidelines on the contents of the MAs and gives rights to parties to agree other contents. This is somehow positive given that there is less State’s interference in the parties’ agreements. However, in some circumstances where FIEs lack of experience, they would face difficulties in negotiating contents for MAs and in contractual implementation as well. Disputes and conflicts often stem from MA’s implementation specifically relating to two main points which include the setting up of annual budget and the recruitment of employees. Circular 13/TTLB’s provisions on the roles and rights of FIEs with respect to annual budget and recruitment are still unclear. Within this view, it is seen that a sample MA is necessary while considering a new legal document revising Circular 13/TTLB.

The last issue relates to annual management fee. Circular 13/TTLB fixes the ceiling management fee to be paid by FIEs to management organizations, for instance, 3% incomes and 10% gross operating profits with respect to hotel industry, 2% incomes and 5% gross operating profits for business in offices and apartments for lease etc. In practice, annual management fees paid by FIEs are often higher than the ceiling amount and the fee stated in the approved MAs. How to deal with this situation?

In view of many changes made to the legislation in foreign investment sector since 1997 to now, Circular 13/TTLB is obviously obsolete and really needs to be revised to meet foreign investors' requirements and the Government's promotion of foreign investment into the country.

### **FIEs' Club becomes FIEs' Association**

The Ministry of Interiors decided to transform the Club of foreign invested enterprises into the Association of foreign invested enterprises in accordance with Decision 91/2003/QĐ-BNV dated December 31, 2003.

## **SOEs Reform**

### **Legal development in SOE reform in Vietnam**

*[Article published in the Vietnam Investment Review, the Legal Column, Issue dated 2 February 2004]*

#### **Backgrounds**

The slow progress of issuing legal documents on SOE reform may be one amongst the reasons attributably hindering the SOE reform in the country from reaching the year target. The recent announcement of the long-awaited Law on SOEs may bring new air to the SOE reform process and starting the new phase for legal development in this area since the introduction of the Premier Decision No.183/2001/QĐ-TTg on 20 November 2001, enclosing the Government action plan for implementation of the resolution of the third plenum of the Central Party Committee of IX session ("Decision 183").

#### **The needs**

According to Decision 183, initially there are totally 26 legal documents of different types and validity in need of either review for revision or new issuance, then some others being added from time to time to that list making the total reached 32 ones. [See details in the table enclosed]. In the first group [documents in need of review], the Law on SOEs got easily the top priority, following by a number of existing laws, ordinances, Government decrees and Premier decisions covering almost all aspects of organization and operations of SOEs, as well as procedures for SOE reform and transformation. The second group [documents in need of new issuance] mainly focuses on further rationalizing and simplifying the procedures for SOE reform, creating criteria and conditions for SOE reform and reviewing the operations of remaining SOEs.

#### **Recent efforts**

Till the end of 2003, 14 legal documents have been revised or newly issued. In response to the first issue arose from the SOE reform practice that is how to classify SOEs for having appropriate treatments with each category, Premier Decision 58 was promptly issued, providing tools for varied State agencies (line-ministries, people's committees) and GCs to classify their managed GCs and SOEs for reform and further development, and finalize their master plans for re-arrangement of their managed GCs and SOEs for submission to the Prime Minister. According to Decision 58, State will keep SOE status

for ones operating in important areas relating to national securities and macro economic balancing while divesting its ownership in the major part of SOEs through equitization, assignment, sales, etc. Merger, consolidation, dissolution and bankruptcy are applicable to those making losses without any vitality.

Since the SOE categories and master plans were in existence, the next issue arose is how to divest/ reform SOEs and implement the master plans. Some other legal documents give responses to that. They include Government Decree 64 on SOE equitization; Government Decree 103 and its amending Decree 49 on SOE assignment, sales, contracting and lease; and Government Decree 63 on State one member limited liability companies, play as different vehicles for SOE reform and divestitures.

In addition to those, other legal documents provide hands for smoothing the SOE reform by clearing all barriers lying in the most sensitive and headache issues of the SOE reform process, which name finance and labour in transitional SOEs. Amongst the others, Government Decree 69 confirms to write off bad debts (uncollectible and unpayable) enabling SOEs to have clean financial situation or good health after the divestitures. Government Decree 41 dares to deal with labour redundancies, by offering on the one hand good and ever seen benefits for redundant labourers and on the other hand helping SOEs to have better labour force after the transition. Premier Decision 174 deals with earnings from the State divestitures and financial supports to SOE reform. And, Premier Decision 36 paves the way for foreigners to buy shares in local companies.

The recent Premier Decision 109 lets us have more vehicles for dealing with overdue debts in SOEs. Under that Decision 109, a first ever seen debt trading vehicle in Vietnam, the State Debt and Asset Trading Corporation (abbreviatedly DATC), an SOE, has been established under the umbrella of the Ministry of Finance, which will have its main function of trading overdue debts and assets mainly in SOEs.

### **Further efforts**

Along with the recent efforts in rationalizing and simplifying the SOE reform conditions and procedures, further focuses now should place more on how to support and ensure the healthy vitality for not only SOEs but also divested ones. The recently passed Law on SOEs which will come into full force from 1 July 2004, will surely serve the base for setting the rules for those and speeding up the legal draft and issuance process.

In that attempt, the most recently issued Premier Decision 271, provides the detailed rules for how to supervise and assess the operational efficiency of SOEs. According to that Decision 271, different criteria in financial, business and social will be used to evaluate on an annual basis the operational efficiency of each SOE and that the State having controlling shares or contributed capital. The evaluation results will serve as the basis for making decision on the future of SOEs and their management.

Nevertheless, 18 other legal documents still remain in the queue for further review and new issuance in the time to come, of which some decrees must be available before the validity of the new Law on SOEs. They include the proposed Government decree on exercising the State ownership right over SOEs; the decree on conversion of GCs and large-sized SOEs under holding company model; the decree on new SOE establishment, re-organization, dissolution and bankruptcy; the decree on public utility activities; the decree on SOE standard charter; the decree providing the regime on labour,

management and income in SOEs; and decisions dealing with human resources development and management in SOEs.

Since holding company model issue is getting more public debates and consensus, this together with the need of having legal basis for about 40 GCs and SOEs having Premier decision on pilot conversion, expose more pressures for the law makers and urging urgent need for new issuance of a decree on that.

Trying to separate the State management and business monitoring, an investment vehicle is planned to set up in Vietnam, called State Financial Investment Corporation (abbreviatedly SFIC), which will take the second mandate as said from State agencies (line-ministries and people's committees). Once established, this would be the one which is fully responsible for investing State capital for the purpose of earning profits, and managing its investment in SOEs, while the said State agencies will be engaged in State management only. Enabling this mandate, a law on management of State capital invested in business areas is in drafting plan.

### **Conclusion**

With recent efforts and commitment from the Government, we can hope for having a quite comprehensive and supportive legal framework for SOE reform and development by the year 2005.

### **List of legal documents supporting SOE reform**

No.	New documents	Old documents
<b>I.</b>	<b>Revised or Newly Issued Documents (by time order)</b>	
1	Decree 63/2001/ND-CP, dated 14 September 2001, of the Government, on conversion of SOEs into one-member limited liability companies	
2	Decision 180/2001/QD-TTg, dated 16 November 2001, of the Prime Minister, on the Deputy General Directors, Chief Accountants, and Directors of 100% State capital SOEs which are GCs' members	
3	Decree 41/2002/ND-CP, dated 11 April 2002, of the Government, on the policies toward redundant labour due to SOE reform	
4	Decree 49/2002/ND-CP, dated 24 April 2002, of the Government, on the assignment, sales, contracting out and leasing of SOEs	Amended Decree 103/1999/ND-CP, dated 10 September 1999, on the assignment, sales, contracting out and leasing of SOEs
5	Decision 58/2002/QD-TTg, dated 26 April 2002, of the Prime Minister, on the classification criteria for SOEs	
6	Decree 64/2002/ND-CP, dated 19 June 2002, of the Government, on the conversion of SOEs into joint stock companies.	Replaced 44/1998/ND-CP, dated 29 June 1998, of the Government, on the conversion of SOEs into joint stock companies.
7	Decree 69/2002/ND-CP, dated 12 July 2002, of the Government, on the management and settlement of outstanding debts of SOEs.	



8	Decision 174/2002/QD-TTg, dated 2 December 2002, of the Prime Minister on the organization and operation of the Fund Supporting the SOE Re-arrangement and Equitization	Replaced Decision 177/1999/QD-TTg, dated 30 August 1999, of the Prime Minister on the organization and operation of the Fund Supporting the SOE Re-arrangement and Equitization
9	Decree 07/2003/ND-CP, dated 30 January 2003, of the Government, on the management rule on investment and construction.	Amended Decree 52/1999/ND-CP and its amending Decree 12/2002/ND-CP, on the management rule on investment and construction
10	Decision 36/2003/QD-TT, dated 11 March 2003, on buying shares by foreigners in local companies	Replaced Decision 145/QD-TTg, dated 28 June 1999, on selling shares in local companies to foreigners
11	Decision 109/2003/QD-TTg, dated 5 June 2003, of the Prime Minister, on establishment of the State Debt and Asset Trading Corporation (DATC)	
12	Decision 271/2003/QD-TTg, dated 31 December 2003, of the Prime Minister, on management and assessment of operational efficiency in SOEs	
13	Law on Accounting, passed on 7 June 2003 and will come into full effect from 1 January 2004	Replaced the Ordinance on Accounting and Statistics, passed on 10 May 1988
14	Law on SOEs, passed on 26 November 2003 and will come into full effect from 1 July 2004	Replaced the Law on SOEs, passed on 20 April 1995
<b>II. Documents to be Issued</b>		
15	Government Decree on conversion of GCs and SOEs under the holding company model.	
16	Government Decree on the mechanism for financial management and business accounting in SOEs	To replace Decree 59/CP, dated 3 October 1996, of the Government, issuing the regulations on financial management and business accounting in SOEs and its amending Decree 27/1999/ND-CP, dated 20 April 1999
17	Government Decree on exercise of the State ownership right over SOEs	
18	Government Decree on the procedures of establishment, re-organization, dissolution and bankruptcy of SOEs	To replace Decree 50/CP, dated 28 August 1996, on the procedures of establishment, re-organization, dissolution and bankruptcy of SOEs, and its amending Decree 38/CP, dated 28 April 1997
19	Government Decree on the labour, salary and income management regime in SOEs	To replace Decree 28/CP, dated 28 March 1997, of the Government, on the labour, salary and income management regime in SOEs

20	Government Decree on the public service activities	To replace Decree 56/CP, dated 2 October 1996, of the Government, on the public service SOEs
21	Prime Minister Decision on establishment of the State Financial Investment Company (SFIC)	
22	Prime Minister Decision on criteria and regulations for recruitment of management staff for SOEs	
23	Prime Minister Decision on training and usage of management staff for SOEs	
24	Proposal for establishment of economic groups	To replace Decision 90/TTg, dated 7 March 1994, of the Prime Minister, on continuous re-arrangement of SOEs, and Decision 91/TTg, dated 7 March 1994, of the Prime Minister, on pilot establishment of economic group
25	Prime Minister Decision on the responsibilities, material and spiritual incentives for Directors of SOEs	
26	Prime Minister Decision on the salary and allowance regime for Boards of management and Boards of supervision in GCs	To replace Decision 83/1998/QD-TTg, dated 15 April 1998, of the Prime Minister, on the salary and allowance regime for Boards of management and Boards of supervision in GCs
27	Prime Minister Decision on decentralization of the appointment of management staff in GCs	
28	Ordinance on Anti-Corruption	To amend the ordinance on Anti-Corruption, passed on 26 February 1998
29	Ordinance on State Auditing	
30	Law on Competition	
31	Law on usage of State capital invested in business areas	
32	Law on Bankruptcy	

## Intellectual Property

### The Government returns trademark management roles to the MOST

The Government has issued Decree 29/2004ND-CP dated January 16, 2004 on functions, tasks and competence of the Ministry of Trade, and adjusted those of the Ministry of Science and Technology by Decree 28/2004/ND-CP dated January 16, 2004.

Under those Decrees, the Ministry of Science and Technology now takes back the roles of trademark management, including registration for protection of intellectual property rights with respect to trademarks. In addition, this Ministry is assigned to play major roles in settlement of intellectual property related disputes.



## **Other Sectors**

### **Taxation**

- According to Decision 224/2003/QD-BTC of the Ministry of Finance, from December 26, 2003 the export duty of leaded and unleaded gasoline, naphtha, reformat and substances for making gasoline are reduced to 5%.
- Circular 09/2003/TT-BTM dated December 15, 2003 of the Ministry of Trade, guiding the implementation of Government's Decision 91/2003/QD-TTg dated May 9, 2003, on applying tariff quota on imports into Vietnam in 2004.
- Circular 127/2003/TT-BTC dated December 22, 2003 of the Ministry of Finance, guiding the implementation of Prime Minister's Decision 197/2003/QD-TTg dated September 23, 2003, on piloting the implementation of self-declaration & payment of taxes applicable to business enterprises.
- Circular 128/2003/TT-BTC dated December 22, 2003 guiding the implementation of Government's Decree 164/2003/ND-Cp dated December 22, 2003 on corporate income tax.
- Circular 02/2004/TT-BTC dated January 8, 2004 of the Ministry of Finance guiding for clearing off tax debts for households, traders that stem from objective factors.

### **Import-Export**

- On December 17, 2003, the Prime Minister issued Decision 266/2003/QD-TTg on the approval of the program for development of export commodities market in 2004-2005 period.

### **Trade**

- On December 25, 2003, the Government issued Decree 170/2003/ND-CP to detail the Ordinance on Pricing.
- The Ministry of Interiors issued Circular 01/2004/TT-BNV dated January 15, 2004 guiding the implementation of the Government's Decree 88/2003/ND-CP dated July 30, 2003 on organization and management of associations.

### **Telecoms**

- On January 6, 2004, the Ministry of Post & Telecommunication issued Dispatch 16/BBCVT-KHTC guiding the implementation of the Prime Minister's Decision 217/2003/QD-TTg on the management of the service fee in the field of post and telecommunication. The enterprises, which do not have dominating market share, are entitle to determine the fee of post and telecommunication services at their disposal.

### **Banking**

- The State bank of Vietnam issued Circular 12/2003/NHNN on December 23, 2003, on the amendment of and supplementation to Circular 03/2000/TT-NHNN dated March 16, 2000, guiding the implementation of Government's Decree 89/1999/ND-CP dated September 1, 1999 on insurance of deposit.

- The Governor of State Bank of Vietnam issued Decision 17/2004/NHNN on January 5, 2004, issuing the Regulations on payment in purchase, sale and exchange of goods and commercial services at the frontier area of Vietnam-Cambodia.

**Arbitration**

- On January 15, 2004, the Government issued Decree 25/2004/ND-CP guiding the implementation of the Ordinance on Commercial Arbitration.

**Motors & Automobiles**

- On December 31, 2003, the Minister of Science and Technology issued Decision 37/2003/QD-BKHCN on promulgation of the Regulations on management of quality, industrial property and technology transfer of motorbikes, engines and spare parts which were manufactured and assembled domestically or imported. This Decision replaces Decision 01/2003/QD-BKHCN dated January 30, 2003.
- On January 13, 2004, the Government issued Decree 23/2004/ND-CP on the deadlines of use of automobiles. Trucks and passenger carrying cars are allowed to use for not more than 25 and 20 years respectively.

**Miscellaneous**

- Law 18/2003/QH11 dated November 26, 2003 of the National Assembly on Co-operatives.
- Law dated November 26, 2003 of the National Assembly on Construction.

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