



Legal Newsletter – April 2019



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Part 1 - Concerns

PRIVATE BUSINESSES: BESIEGED AND UNDER PRESSURE

Luong Van Ly – Lawyer Tran Thanh Tung

In the context of a Government always advocating a favourable business environment for the private sector, which serves as a major driving force to economic growth, what are the factors which might impede growth in this sector?

Caught in the crossfire

In the course of practicing law, we have been lucky enough to work with many foreign and domestic traders who have been doing business in Vietnam. Through the interactions with them, we have been able to gather insights which may answer the said question.

Overall, the Vietnamese economy can be divided into three sectors: state invested enterprises, FDI enterprises and domestic private enterprises. The statistics indicate that FDI enterprises grow fairly well in Vietnam and play an increasingly important role in the economy. State invested enterprises have fallen short of the expectation to bring about a powerful boost to the economy in alignment with the social resources they have been holding. Private businesses are mostly small and very small ones.

In the overall relationship, domestic private businesses are being put under pressure by state invested enterprises and FDI enterprises. State owned enterprises receive a critical advantage: the mechanism and the historical relationship with state authorities. This advantage enables state owned enterprises to access important business resources such as land, natural resources, finance, credit accessibility and many other incentives.

FDI enterprises have multiple advantages when they run businesses and invest in Vietnam. With enormous investments, they are welcomed everywhere; provinces and cities scramble to invite them in through incentives on tax, land, policies etc. Domestic private businesses can hardly dare to dream about such a red carpet, except for giant ones. FDI enterprises also have a distinct advantage, perceived as the possibility of avoiding the control of Vietnamese law. They have business activities in Vietnam but



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their head offices are located overseas. Their operations cross Vietnamese borders, so they go beyond the control of the Vietnamese Government. In principle, Vietnamese law cannot remain in full force beyond Vietnamese borders. If a foreign employer suffers business losses in Vietnam, he definitely can leave his business and return to his country. Then the Vietnamese Government and his creditors will busy themselves with treating the leftover "garbage heap". Therefore, FDI enterprises will still grow regardless of how the Vietnamese law changes.

What advantages do private businesses have? Almost nothing. With tiny investments, they do not dare to dream about incentives from local authorities. Without access to large resources of land and finance, they must rely on state owned and FDI enterprises to survive and grow. Since it is impossible for them to get away from their business activities to stay overseas, private businesses have no choice but to cope with difficulties in Vietnam. They eventually cannot escape from Vietnam's business mechanism and environment. So, they remain "sustainably small". According to Mr. Vu Tien Loc – Chairman of the Vietnam Chamber of Commerce and Industry, private businesses are just "coracles" in the ocean. Actually, most of them are not strong enough to cope with the competitive pressure of the domestic economy, not to mention "offshore fishing".

The State – Referee or Competitor?

In the relationship with the corporate community, the State is playing two roles simultaneously - the rule-maker and the investor. The State enacts laws as playing rules for enterprises of all types to compete with one another equally while functioning as a referee in case of a dispute amongst players. Its second role includes making investments and holding capital in state owned/invested enterprises. To become a fair referee, the State must be neutral and not for profit, but to generate profits, the State as an investor must compete with other enterprises to gain profits. So, these two roles contradict each other.

Currently, the State is not functioning well as a rule-maker. Many policies and laws are aimed at exalting state management rather than facilitating enterprises. The 2014 Enterprise Law attempts to eliminate the arbitrary issuance of business conditions which have been previously "confined" to conditional business lines – at a figure of 276 (now down to 243). However, business conditions can still be issued by



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other ministries or state authorities whenever they want. Struggling for the freedom of business has always been a battle since 1990 (when the Private Enterprise Law and the first Company Law were enacted) until now. The Vinasun versus Grab lawsuit is in effect a dispute between Vinasun and the State to remove unfair business conditions and to claim rights and equal business in favour of traditional taxi companies.

Moreover, unfavourable policies by the State may come upon private businesses at any time. The recent controversy about the draft National Standards on "normative practices in fish sauce production" between traditional and industrial fish sauce may be seen as an example.

Looking at the growth of FDI and private businesses, we may subconsciously think – is it right that the mechanisms and laws by the State might impede the growth of private businesses? To many of us, the answer is clear!



How to develop private businesses?

We can see from the current context that private businesses are besieged on three sides by FDI enterprises, state invested enterprises and the State itself, which squeezes the growing space of private enterprises. A policy related question can also be raised: what should the State do to develop private businesses? Bring them much more growing space!

In terms of policies, it is perhaps high time for the State to change its view about the level of priority between state owned and private enterprises, whereby it must prioritize private enterprises and consider them as a driving force of the economy.

As a matter of law, for the upcoming occasion amending the Enterprise Law and Investment Law, we think it is necessary to narrow the scope of prohibited or conditional business lines for the sake of the right to business of the enterprises. Concurrently, the State should take a bold step to abolish the Investment Law or integrate it into the Enterprise Law because the Investment Law has ended its historical role.

In the long term, the State should seek to diminish its role step by step as an investor to become a better rule-maker. Equitization is a suitable measure which should be promoted to diversify the ownership in state owned enterprises, thereby enhancing the performance of this sector.

Part 2 - Remarkable Regulations

1. FOREIGN INVESTORS ARE ELIGIBLE TO PAY A DEPOSIT IN A TRANSFERRED FOREIGN CURRENCY UPON JOINING AN AUCTION OF THE STATE OWNED ENTERPRISES THAT ARE EQUITIZED OR DIVESTED

As of March 29, 2019, the State Bank issued Circular No. 03/2019/TT-NHNN amending and supplementing a number of articles of Circular No. 32/2013/TT-NHNN dated December 26, 2013 guiding the implementation of the regulation on restricting the use of foreign exchange in the territory of Vietnam ("Circular 03").

In order to promote the progress of equitization and divestment of the state owned enterprises and state invested enterprises, foreign non-resident investors are expedited to pay a deposit in any transferred foreign currency upon participating in an auction in the following cases:

- Purchasing shares at the state owned enterprises that will be equitized upon approval by the Prime Minister;
- Purchasing shares, capital contribution portions of state owned enterprises and the state invested enterprises that will be divested upon approval by the Prime Minister;
- Purchasing shares, capital contribution portions of state owned enterprises investing in other enterprises that will be invested upon approval by the Prime Minister.

Based on the auction results, Circular 03 stipulates the rights and obligations of foreign investors as follows:



- (i) In case of winning an auction, foreign investors will transfer investment capital in the form of transfer into the direct investment capital account and comply with the law on foreign exchange management for payment of the purchase value of shares and capital contribution portions.
- (ii) In case of failure to win an auction, foreign investors remit abroad the deposit in foreign currency after subtracting related arising expenses (if any).

Circular 03 will take effect from May 13, 2019.

2. FRESH POINTS IN CIRCULAR NO. 05/2019/TT-BKHDT GUIDING THE SUPPORT FOR HUMAN RESOURCES DEVELOPMENT IN FAVOUR OF SMALL AND MEDIUM SIZED ENTERPRISES

As of March 29, 2019, the Government issued

Circular No. 05/2019/TT-BKHDT ("**Circular 05**") regulating support for human resources development in favour of small and medium sized enterprises. Accordingly, Circular 05 features the following notable fresh points:

Regulation on the support levels from the state budget

Circular 05 specifies the support levels from the state budget, namely supporting at least 50% of the total cost of organizing a training course for business start-ups, business administration and 100% tuition for attendants of small and medium sized enterprises in extremely difficult socio-economic areas and attendants of small and medium sized enterprises owned by women when participating in training courses in business start-ups, business administration and intensive business administration.

Concretizing the regulation on training courses in business start-ups, business administration, intensive business administration, direct training in manufacturing and processing enterprises, online training and training via mass media

Each specific training will provide learners with knowledge related to that training. In addition, the contents of training courses are also detailed by Circular 05, including training course name, training subject, training duration, attendants, and the minimum number of attendants and organizing processes. Particularly for online training and training via mass media, employees and managers of small and medium sized enterprises will be granted an account to participate in learning on the online systems or their mobile device.

Circular 05 takes effect from May 12, 2019.

3. NEW CIRCULAR TO GUIDE REGISTRATION OF COOPERATIVES AND REPORTING REGIME OF COOPERATIVES' OPERATIONS

As of 08/04/2019, the Ministry of Planning and Investment issued Circular No. 07/2019/TT-BKHDT ("**Circular 07**") to amend and supplement some articles of Circular No. 03/2014/TT-BKHDT ("**Circular 03**") guiding the registration of cooperatives and the reporting regime of cooperatives' operations. Accordingly, Circular 07 features the following key points:

Principles in conducting the cooperative registration procedure



The cooperative registration procedure must be conducted in compliance with the following principles:

- The founder of the cooperative will by himself declare information in registration dossiers and is responsible for its legality, truthfulness and accuracy.
- The cooperative registration agency is only responsible for the validity of registration dossiers, not for law breaching conduct of the cooperative or

its founder.

- The cooperative registration agency does not assume responsibility for resolving disputes among cooperatives, or between a cooperative and other organizations or individuals.

Supplementing the cases of business line registration

As prescribed by Circular 07, if a cooperative wishes to register a business line more detailed than a class 4 industry, it will select a class 4 industry in the Vietnam Standard Industrial Classification System, and then fill in the details of the business line under the class 4 industry, but must ensure its consistency with the selected class 4 industry. In addition, cooperatives are allowed to register a conditional business line after fulfilling the prescribed conditions, and must satisfy those conditions throughout their operations.

Registering cooperatives

The cooperative registration procedure can be conducted on-line with public digital signatures. On-line registration dossiers are similar to paper registration dossiers but must be authenticated by a public digital signature of the subject entitled to use it as prescribed by law. Circular 07 also provides detailed instructions on the order and procedure for registering cooperatives on-line with public digital signatures. In addition, Circular 07 shortens the time limit to issue certificates of cooperative registration from 05 to 03 working days from the date of receipt of valid dossiers.

Furthermore, after finishing the procedure for registering cooperatives, each cooperative will be given a unique code consisting of 10 digits as prescribed in Circular 03 but this code is also the tax code.

Circular 07 comes into effect as from May 28, 2019.

Part 3 - Monthly Legal Update

No.	DOCUMENT TITLE	ISSUANCE DATE	EFFECTIVE DATE
GOVERNMENT			
1.	Decree 35/2019/ND-CP of the Government stipulating administrative sanctions in the field of forestry	25/04/2019	10/06/2019
2.	Decree 33/2019/ND-CP of the Government providing for the management, use and exploitation of the road traffic infrastructure	23/04/2019	17/06/2019
3.	Decree 32/2019/ND-CP of the Government on delegating the task, placing an order or holding a bid to supply public products and services using regular expenditures from the State Budget	10/04/2019	01/06/2019
4.	Decree 31/2019/ND-CP of the Government detailing a number of articles and measures to implement the Law on denunciations	10/04/2019	28/05/2019
5.	Decree 30/2019/ND-CP of the Government amending and supplementing some articles of Decree 99/2015/ND-CP dated 20/10/2015 of the Government detailing and guiding the some articles of the Law on Housing	28/03/2019	15/05/2019
MINISTRY OF INDUSTRY AND TRADE			
1.	Circular 07/2019/TT-BCT of the Ministry of Industry and Trade providing for the export of textile products to Mexico under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership	19/04/2019	20/06/2019
MINISTRY OF TRANSPORT			
1.	Circular 13/2019/TT-BGTVT of the Ministry of Transport detailing the Aviation Security Program and the quality control of aviation security in Vietnam	29/03/2019	01/06/2019
MINISTRY OF PLANNING AND INVESTMENT			
1.	Circular 07/2019/TT-BKHDT of the Ministry of Planning and Investment on amending and supplementing some articles of	08/04/2019	28/05/2019

	Circular 03/2014/TT-BKHDT dated 26/05/2014 by the Ministry of Planning and Investment guiding the registration of cooperatives and the reporting regime of cooperatives' operations		
2.	Circular 05/2019/TT-BKHDT of the Ministry of Planning and Investment guiding how to support the development of human resources for small- and medium-sized enterprises	29/03/2019	12/05/2019
MINISTRY OF FINANCE			
1.	Circular 24/2019/TT-BTC of the Ministry of Finance guiding some points of Decree 04/2019/ND-CP dated 11/01/2019 of the Government stipulating the standards and norms in using cars	22/04/2019	06/06/2019
2.	Circular 22/2019/TT-BTC of the Ministry of Finance amending and supplementing some articles of Circular 12/2015/TT-BTC dated 30/01/2015 by the Minister of Finance detailing the procedure for issuing professional certificates of customs declaration; granting and revoking codes of agents conducting customs procedures; order and procedure for recognizing the operations of agencies conducting customs procedures	16/04/2019	01/07/2019
3.	Circular 21/2019/TT-BTC of the Ministry of Finance guiding the first offering of shares and the transfer of State capital under the book building method	11/04/2019	03/06/2019
4.	Circular 19/2019/TT-BTC of the Ministry of Finance abolishing Circular 304/2016/TT-BTC dated 15/11/2016 by the Minister of Finance issuing the Price List to calculate registration fees for automobiles and motorcycles	09/04/2019	10/04/2019
5.	Circular 18/2019/TT-BTC of the Ministry of Finance abolishing Circular 134/2014/TT-BTC dated 12/09/2014 by the Ministry of Finance guiding the procedure for extending the time limit to pay tax and refund value-added tax with respect to machines and equipment imported to form fixed assets of investment projects	03/04/2019	20/05/2019
MINISTRY OF HEALTH			
1.	Circular 03/2019/TT-BYT of the Ministry of Health on issuing the List of domestically manufactured medicines meeting	28/03/2019	01/06/2019

	treating requirements, prices and supply sources		
2.	Circular 05/2019/TT-BYT of the Ministry of Health abolishing Circular 31/2017/TT-BYT dated 25/07/2017 by the Minister of Health issuing the List of products and goods which may cause dangers under the management scope of the Ministry of Health	28/03/2016	01/06/2019
THE STATE BANK OF VIETNAM			
1.	Circular 04/2019/TT-NHNN of the State Bank of Vietnam on amending and supplementing some articles of Circular 24/2013/TT-NHNN dated 02/12/2013 by the Governor of the State Bank of Vietnam on classification of assets and off-balance-sheet commitments of Vietnam Development Bank	29/03/2019	15/05/2019
2.	Circular 03/2019/TT-NHNN of the State Bank of Vietnam on amending and supplementing some articles of Circular 32/2013/TT-NHNN dated 26/12/2013 by the Governor of the State Bank guiding the regulation on limiting the use of foreign currencies within the Vietnamese territory	29/03/2019	13/05/2019



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