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RESEARCH AND POLICY ADVOCACY ACTIVITIES



In order to provide foreign investors with an overview of the legal framework related to investment laws in Viet Nam, the World Bank Group has published the Investment Policy and Regulatory Review. Mr. Nguyen Hung Quang, as an expert of the World Bank Group, was invited to contribute comments to this Report.

For more details on the Report, please visit the link:

<http://documents.worldbank.org/curated/en/400351586323809041/pdf/Vietnam-2019-Investment-Policy-and-Regulatory-Review.pdf>

In addition, on May 15, 2020, the EU Justice and Legal Empowerment Programme in Viet Nam (EU JULE) in collaboration with the Supreme People's Court and the United Nations Development Program (UNDP) held a Seminar on Commentary about Draft of Law on Court-Annexed Mediation. Mr. Nguyen Hung Quang was invited to the Seminar to make comments on this Draft Law. Presenting at the Seminar, he raised 4 main issues that should be improved in the Draft Law, including (i) ensuring that the court-annexed mediation, dialogue activities do not withdraw regulations on mediation activities in other legislation, (ii) ensuring the inclusion of some important principles of court-annexed mediation and dialogue such as confidentiality, impartiality, objectivity, etc., (iii) the mechanism of court-annexed mediation and dialogue must facilitate the access to justice of vulnerable groups and (iv) the role of courts and Judges in the court-annexed mediation, dialogue.



Bulletins

Commerce

Decree providing detailed guidelines for some articles of Competition Law 2018

My Hiep

Name of the document: Decree No. 35/2020/ND-CP providing detailed guidelines for some articles of the Competition Law (**Decree 35**)

Effective date: May 15, 2020

- **Some key contents:**

In order to provide sufficient legal basis for implementation of the Competition Law 2018, on March 24, 2020, the Government issued Decree 35 to replace Decree No. 116/2005/ND-CP providing detailed guidelines for some articles of the Competition Law. Some notable contents of Decree 35 include:

Firstly, the concept of “control and domination” in company acquisition has been defined more clearly in Decree 35. Accordingly, Enterprise A controls and dominates Enterprise B or one of its business lines when Enterprise A directly or indirectly acquires all or part of Enterprise B’s capital contribution or assets in the following cases¹:

- (i) Enterprise A obtains the ownership right or use right that makes up more than 50% of charter capital or more than 50% of total voting shares of Enterprise B;
- (ii) Enterprise A obtains the right to own or use more than 50% of Enterprise B’s total assets, out of all or one business line of Enterprise B;
- (iii) Enterprise A has one of the rights to manage and operate Enterprise B².

Secondly, Decree 35 also provides additional guidelines for Article 13 Competition Law 2018³ related to the market share of enterprises upon engagement in sales and purchase agreements. Accordingly, an anti-competitive agreement is considered not to cause or unlikely to cause significant anti-competitive effects if it is subject to one of the following cases⁴:

- (i) Anti-competitive agreement among enterprises in the same related market if the joint market share of the enterprises engaged in the agreement is less than 5%;

- (ii) Anti-competitive agreements among enterprises involving in different stages in the same production, distribution and supply chain for a certain type of goods or service if the market share of each enterprise engaged in the agreement is less than 15%.

Thirdly, Decree 35 provides further guidelines for the “threshold of economic concentration” prescribed in Article 33 Competition Law 2018. Accordingly, an enterprise is supposed to submit the dossiers notifying economic concentration to the National Competition Commission in one of the following cases⁵:

- (i) Total asset available or total sales or purchase value arising in the Vietnamese market of such enterprise or the group of affiliated companies of which the enterprise is a member must be worth VND 3,000 billion or more in the fiscal year preceding the planned year of economic concentration;
- (ii) The transaction value of economic concentration must be worth at least VND 1,000 billion;
- (iii) The joint market share of the enterprises planning to engage in the economic concentration must account for at least 20% of the total shares of the relevant market in the fiscal year preceding the planned year of economic concentration.

For credit institutions, insurance enterprises and securities companies planning to engage in economic concentration, they shall be subject to separate thresholds applied to these organizations⁶.

• **Some comments and recommendations:**

The Competition Law 2018 has created a new legal framework for competition. Providing detailed guidelines for the law, Decree 35 contributes to realize the objectives of the Competition Law 2018 and provides enterprises clearer legal bases for consideration whether the competition authority’s assessment of the impact by anti-competitive agreements or economic concentration on their enterprise is compliant to provisions of law or not. However, there are still some opinions about the regulations on the threshold for notification of economic concentration (when notices are required for transactions with the value from 1,000 billion Viet Nam dong or more), which worry that the threshold set forth in Decree 35 may give rise to the number of M&A transactions in the market that must follow this procedure, resulting in cost increase for the enterprises engaged⁷.

Before conducting M&A or other business strategies, enterprises should pay attention to new provisions of the Competition Law 2018 and the guidelines of Decree 35 to consider whether such activities are subject to economic concentration or not. In the event that notification to the competition authority is a must, the notification procedures should be prepared and processed in strict accordance with provisions of laws to avoid unnecessary violations and related sanctions. In addition, it should be noted that the regulation on threshold for notification of economic concentration applies not only to domestic business activities but also to economic concentration performed outside Vietnamese territory⁸. Therefore, enterprise should address such new provision of the Competition Law 2018 to employ appropriate legal advices when conducting M&A transactions of great value outside the territory of Viet Nam.

Litigation

Regulations on coercion of judgment enforcement against commercial juridical persons

Kim Anh

Name of the document: Decree No. 44/2020/ND-CP providing for coercion of judgment enforcement against commercial juridical persons (**Decree 44**)

Effective Date: June 1, 2020

- **Some key contents:**

To provide detailed guidelines for implementation of Article 163, Law on Execution of Criminal Judgments 2019, the Government has issued Decree 44 specifying the judgment enforcement coercion against commercial juridical persons (hereinafter referred to as "**CJPs**"). This Decree provides some key information as follows:

Firstly, the Decree provides detailed guidelines for measures of judgment enforcement coercion against CJPs, including (i) account freeze, (ii) distraint of assets, and (iii) impoundment of materials, documents and devices containing electronic data or impoundment or withdrawal of CJPs' seals⁹.

In terms of account freeze, this measure may be applied in two cases¹⁰:

- Circumstance 01: coercion is implemented in serving **criminal punishments**, including (i) suspending operations within certain time (in case where all areas are suspended), (ii) prohibition of business and operation in certain areas (in case where business and operation is prohibited in all areas) and (iii) prohibition of capital mobilization.
- Circumstance 02: coercion is implemented in serving **judicial measures**, including (i) Compulsory restoration of the original state and (ii) Compulsory implementation of some measures for remedy and prevention of further consequences.

As regards distraint of assets, this measure is applied to Circumstance 02 analyzed herein. Assets distrained are those with values equivalent to the sum put up as a guarantee for the coercive execution of judicial measures.¹¹

Impoundment of materials, documents and devices containing electronic data; impoundment or withdrawal of seals: this measure may be applied in coercive enforcement of punishments comprising of (i) operation suspension within a certain time, (ii) prohibition of doing business, (iii) prohibition of operation in certain areas, (iv) prohibition of capital mobilization under legal binding judgments or decisions of Courts. Besides, CJPs' seal shall be withdrawn upon coercive enforcing the punishment of permanent shutdown¹².

Secondly, judgment enforcement coercion must comply with the following fundamental rules¹³:

- (i) The enforcement can only be conducted upon written decision on coercive enforcement by competent criminal judgment enforcement agencies.

- (ii) The decision to apply coercive measures must be made according to the punishment and judicial measures imposed on CJPs, contents, nature, degree, and conditions for execution of coercion decisions and actual situation at the locality.
- (iii) The time for application of coercion measures to assure that judgments are enforced within the time limit for serving punishment under legal binding judgments of Courts; the time limit for ensuring execution of judicial measures is determined once the judicial measure is completely enforced.
- (iv) A CJP may be subject to one or more coercive measures at the same time if the application of a single coercive measure is insufficient to ensure judgment execution;
- (v) Legitimate rights and benefits of CJPs, relevant organizations, and individuals are protected in coercive judgment enforcement.

- **Some comments and recommendations:**

Prosecution of CJP's criminal liabilities is one of the new contents supplemented to Vietnam's criminal institutions, demonstrating a breakthrough in the criminal legislative thinking. However, to minimize cases where CJPs reject cooperation during judgment enforcement, it is necessary to have coercive measures to ensure strict execution of all legal binding judgments against CJPs in practice. Therefore, it can be seen that Decree 44 has provided more detailed and specific guidelines for the conditions, sequences and procedures prescribed in the Law on Enforcement of Criminal Judgments 2019 to apply coercive judgment enforcement against CJPs.

An additional point to be addressed is that, in the case that a CJP being subject to a decision on coercive judgment enforcement is divided, separated, consolidated, acquired or converted its form of enterprise under laws, the CJP that inherits the rights and obligations of the former CJP will be responsible for continuing implementing the enforcement decision of the competent criminal judgment enforcement agency¹⁴. In short, this is one of the important issues that enterprises planning to conduct M&A transactions need to be aware of.



Draft Law Commentary

Draft Decree guiding the regulations of the Labor Code 2019 on working time and rest time

Hai Linh

*After nearly 7 years of implementation, Decree No. 45/2013/ND-CP guiding regulations of the Labor Code on working time, rest time and occupational safety and labor hygiene (**Decree 45**) has revealed some problems and is no longer suitable to the current socio-economic conditions. With the aim to overcome the shortcomings of Decree 45 and facilitating the implementation of the Labor Code 2019's new regulations in early 2021, the Ministry of Labor, War Invalids and Social Affairs (**MOLISA**) has been drafting a Decree on working time, rest time (**Draft/Draft Decree**) which is expected to generate significant impact on the rights and interests of employees as well as employers. In this Legal Newsletter, NHQuang would provide some analyses of the Draft Decree mentioned above so that readers could have some legal perspectives on the regulations of labor laws to be possibly applied in the future.*

1. Regulations on overtime in normal cases (from 200 hours to 300 hours/year) for part-time employees

Firstly, for cases with total of 200 overtime hours within a year, the Draft Decree supplements regulations on the overtime of part-time employees. Accordingly, for employees whose working hours are fewer than the normal daily, weekly or, monthly working hours prescribed in labor laws, collective labor agreement, or internal working regulations, the total number of normal working hours and overtime hours shall not exceed 12 hours/day¹⁵. The supplementation of these regulations helps to remove difficulties and obstacles for business lines with the working time of less than 8 hours/day but in need to mobilize employees to work overtime during peak hours and peak seasons (for instance, restaurant servers, etc.)¹⁶.

Secondly, the Labor Code 2019 has stipulated 4 cases where working overtime from over 200 hours to 300 hours/year is permitted, and assigned the Government to provide "other cases"¹⁷. The Draft Decree proposes to clarify such "other cases" as "cases of handling urgent work that cannot be delayed due to the peculiarities of sectors and fields of state agencies, units".

2. Regulations on calculation of overtime hours

The calculation of overtime hours in exceptional cases is specified as follows:

Scenario 1: For enterprises which stipulate that the working hours are not full day, full week or working hours is fewer than 8 hours per day or less than 48 hours per week, the overtime hours are calculated as follows¹⁸:

Amount of overtime hours	Regulations of the Draft Decree
Calculation of overtime hours based on the amount of working hours per day	
1. The total number of normal working hours and overtime hours does not exceed 8 hours per day.	<ul style="list-style-type: none"> - The employer must pay for the overtime hours - The overtime hours shall not be accounted to the total amount of overtime hours in a day, a month and a year.
2. The total number of normal working hours and overtime hours is over 8 hours to 12 hours per day.	<ul style="list-style-type: none"> - The employer must pay for the overtime hours with regard to the number of hours that exceed 8 hours/day (after paying for the overtime in accordance with section 1) - Such overtime hours shall be accounted to the overtime hours in the day
Calculation of overtime hours based on the amount of working hours per week	
1. The total number of normal working hours and overtime hours does not exceed 48 hours per week.	<ul style="list-style-type: none"> - Employers must pay for the overtime hours - The overtime hours shall not be accounted to the total amount of overtime hours in the month and year
2. The total number of normal working hours and overtime hours is more than 48 hours per week	<ul style="list-style-type: none"> - Employer must pay for overtime hours with regard to the number of hours that exceeds 48 hours per week totally (after paying for the overtime in accordance with section 1) - Such overtime hours shall be accounted to the total number of overtime hours in the month and the year.

Scenario 2: For enterprises with normal weekly working hours (normal working hours do not exceed 10 hours/day and 48 hours/week), if the total number of working hours does not exceed 48 hours/week, the employer still has to pay overtime for the hours that the employee works overtime in the day; but such overtime hours shall not be accounted to the total number of overtime hours in a month or year.¹⁹

From the two cases mentioned above, it can be seen that regulations of the Draft Decree are not quite clear for enterprises' understanding and application in managing and paying overtime

for employees. Specifically, there are opinions that even with the Draft's regulations, it is still difficult for enterprises to determine when to apply Scenario 1 and when to apply Scenario 2.

In addition, the Draft Decree also stipulates cases that are included in working hours but excluded from the total number of overtime hours in a day, a month, and a year, comprising of:

- (i) Rest breaks included in working hours when employee is working in continuous shifts;
- (ii) Part-time trade union officials' time for involving in meetings, studying and training sessions organized by upper-level trade union in accordance with trade union laws;
- (iii) Time for employees' experience in health examination, occupational disease checkup organized by employers in accordance with the law.

From our review, the Draft Decree has partly removed difficulties and obstacles resulted from regulations of Decree 45, improving the enforcement efficiency in reality. However, some regulations of the Draft still need to be further clarified to assure the enforcement. Currently, the MOLISA has been finalizing the regulations of the Draft based on the collected comments; therefore, enterprises should continuously update information related to the Draft Decree to formulate plans on production and business accordingly.

Note: The article is written based on the Draft Decree guiding regulations of the Labor Code on working time and rest time, which is available at: <http://duthaovanban.molisa.gov.vn/>

All analyses and comments herein are for reference only. This article is not considered as an official legal opinion to apply in any specific case. For further particular advices, please contact us directly.

List of newly promulgated legal documents

No.	Name of the documents	Release date	Effective date
1.	Decree No. 53/2020/ND-CP regulates environmental protection fees for wastewater	5/5/2020	1/7/2020
2.	Circular No. 34/2020/TT-BTC regulates the rates, fees and charges in the construction field	5/5/2020	5/5/2020
3.	Circular No. 37/2020/TT-BTC regulates the rates, fees and charges in the field of securities	7/5/2020	07/05/2020
4.	Circular No. 10/2020/TT-BTTTT amending Circular 30/2011/TT-BTTTT regulating on conformity certification and announcement for products and goods in field of information technology	7/5/2020	1/7/2020
5.	Circular No. 09/2020/TT-BTCT stipulating the roadmap for application of border gates, imports and exports to goods temporarily imported for re-export, transshipment business, and bonded warehouses	14/5/2020	30/6/2020
6.	Circular No. 11/2020/TT-BTTTT regulating the List of products and goods possibly causing unsafety under the management responsibility of the Ministry of Information and Communications	14/5/2020	1/7/2020
7.	Decree No. 57/2020/ND-CP amending Decree 122/2016/ND-CP on the Export Tariff Schedule, Preferential Import Tariff, List of Goods and Absolute tax rate, Mixed Tax, and out-of-quota import tax and Decree 125/2017/ND-CP amending Decree 122/2016/ND-CP	25/5/2020	10/7/2020
8.	Decree No. 58/2020/ND-CP stipulating the rate of compulsory social insurance premiums for contribution to the Labor Accident and Occupational Disease Insurance Fund	27/5/2020	15/7/2020

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¹ Competition Law 2018, Article 29, clause 4; Decree 35, Article 2, clause 1

² Decree 35, Article 2, clause 1, point c

The acquirer has one of the following rights:

- Directly or indirectly making decisions on appointment, dismissal or discharge from office of most or all of members of the Board of Management, President of the Members' Council, Director or General Director of the acquiree;
- Making decisions on amendment or supplement to the acquiree's charter;
- Making decisions on the acquiree's important business matters, including form of business organization; business lines, location, form; changes in business scale and business lines; forms and methods of mobilization, distribution and use of capital.

³ Competition Law 2018, Article 13 on impact assessment or likelihood of causing significant anti-competitive effects of anti-competitive agreements

⁴ Decree 35, Article 11, clause 3

⁵ Decree 35, Article 13, clause 1

⁶ Decree 35, Article 13, clause 2

⁷⁷ Thu Huong-Phan Hang, *Don't let M&A costs increase due to... Decree*, Vietnam Investment Review, August 13, 2019.

See more at:

<https://tinnhanhchungkhoan.vn/mua-ban-sap-nhap/dung-de-chi-phi-ma-tang-vi-nghi-dinh-275041.html>

⁸ Decree 35, Article 13, clause 3

⁹ Decree 44, Article 4

¹⁰ Decree 44, Article 11

¹¹ Decree 44, Article 18

¹² Decree 44, Article 36

¹³ Decree 44, Article 3

¹⁴ Decree 44, Article 8

¹⁵ Draft Decree, Article 4, clause 3

¹⁶ Statement on the issuance of the Decree providing details for a number of articles of the Labor Code 2019 on working time and rest time, page 3

¹⁷ Labor Code 2019, Article 107, clause 3, point dd

¹⁸ Draft Decree, Article 7, clause 1

¹⁹ Draft Decree, Article 7, clause 2