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LEGAL NEWSLETTER

NHQuang&Associates

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Notable activity in April 2021

On April 9, 2021, Mr. Nguyen Hung Quang delivered his presentation on improving the effectiveness of legal compliance cost control in Viet Nam at the Workshop on solutions for reducing legal compliance cost to enhance competitiveness of Viet Nam. The workshop was held by the British Embassy, UNDP Viet Nam and Ministry of Justice. It was subject to UNDP Regional Project "Promoting a Fair Business Environment in ASEAN" funded by UK Prosperity Fund.

02 major contents were addressed including (i) Assessment of the success in legal compliance cost control in Viet Nam; and (ii) Proposals to improve effectiveness of legal compliance cost control in Viet Nam. The presentation is compiled from information, experience, and knowledge to recommend some core issues to improve the quality of legal compliance cost control in Viet Nam. According to Mr. Nguyen Hung Quang, it is now appropriate for Viet Nam to apply a quantitative mechanism to reduce compliance cost for monitoring and evaluating policy and legal provision formulation and drafting, namely One-for-One Rule (Canada) or One-for-Two Rule (USA) or 30% Rule (Viet Nam in 2007-2010 period).

NEW POINTS IN THE DECREE GUIDING THE LAW ON ENTERPRISES

KHANH QUYNH

On April 1, 2021, the Government promulgated Decree No. 47/2021/ND-CP providing details for a number of articles of the Law on Enterprises (**Decree 47**) on social enterprises, state-owned enterprises, group of companies, and national defense and security enterprises with notable contents as follows:

Firstly, allowing social enterprises to divide, seperate, consolidate, merge with other enterprises which are not social enterprises. In the case where the re-organization results in termination of the social and environmental objectives ahead of the committed schedule and dissolution of social enterprises, besides returning to the individuals, agencies or organizations providing aids and sponsorship or transfering to other social enterprises, organizations operating with similar social objectives the remaining assets or financial supports received by social enterprises as prescribed in Decree No. 96/2015/ND-CP guiding the Law on Enterprises, Decree 47 broadens the options for social enterprises in the disposal of assets, which is transferring to the State in accordance with the Civil Code.

Secondly, specifying the cross-ownership among companies in a group of companies. In particular, Decree 47 provides guidelines for Clause 3, Article 195 of the Law on Enterprises about the cases considered as "jointly contribute capital, purchase shares of another enterprise or establish a new enterprise" among subsidiaries having the same parent company being "an enterprise with at least 65% of State capital". Accordingly, 3 cases for contribution of capital, purchase of shares of another enterprise or to establish an enterprise includes: (i) Jointly contribute capital to establish a new enterprise; (ii) Jointly purchase capital contribution, shares of an established enterprise; (iii) Jointly receive the transfer of shares and contribited capital from members or shareholders of an established enterprise. Simultaneously, "an enterprise with at least 65% of State capital" is defined as an enterpise of which 65% or more of its charter capital or total voting shares are held by the State.

In addition, the Decree prescribes that the company's President, Member Council, Board of Directors shall take responsibility for ensuring compliance with regulations on "cross-ownership" when proposing and deciding on contribution of capital, purchase of shares, capital contribution of other companies and jointly bear liabilities to compensate for damage of the company arising from any violation of such regulation.

COMMENTS AND RECOMMENDATIONS

Firsly, Decree 47 has brought many benefits to social enterprises. Specifically, enterprises are no longer confined to maintain their "pure social" nature by only being divided, separated into social enterprises or being consolidated or merged with social enterprises, but also allowed to divide, separate, consolidate, merge with other enterprises. Moreover, their investors shall also have more options upon social enterprises' engagement in the merger and acquisition market. In re-organizing social enterprises, businesses should carefully weigh up the matters relative to sources of assets and financial supports received to ensure compliance with the law and agreements with the involved individuals and organizations.

Secondly, Decree 47 has tighter regulations on cross-ownership among companies within a group. It would be the legal ground to accurately determine the nature of transactions, the responsibilities and powers of corporate managers as well as state management agencies. Therefore, enterprises need to be more cautious in investment transactions related to contributing capital, purchasing shares and capital contribution, receiving transfer of shares and capital contribution among companies within a group. Where a violation related to cross-ownership in the above transactions is detected, the business registration agency will reject any registration for the change of members or shareholders of the company. At the same time, the enterprise in question may be administratively sanctioned from VND 15,000,000 to VND 20,000,000 for the act of "cross-ownership" as prescribed in Article 39, Decree No. 50/2016/ND-CP.

NEW REGULATIONS IN DECREE PROVIDING DETAILS AND GUIDELINES FOR THE LAW ON INVESTMENT

GIA KHANH

Serving the purpose of guiding and concretizing new points of the Law on Investment 2020 which is considered to have solved several entangled investment-related issues, on March 26, 2021 Decree No. 31/2021/ND-CP providing details and guidelines for implementation of some articles of the Law on Investment (**Decree 31**) was issued. This Decree took effect from the date of promulgation and has some prominent contents as follows:

Firsly, the Decree for the first time addresses the mechanism to resolve investors' grievances and prevent State-investors disputes. Accordingly, investors shall have the right to reflect their grievances related to the application and enforcement of law on investment; to lodge complaints, make denunciation, initiate administrative lawsuits when there are grounds to believe that illegal elements exist, infringe upon their legitimate rights and interests. Competent state agencies shall have the responsibility to settle grievances; to promptly notify the Ministry of Planning and Investment, the Ministry of Justice, the Ministry of Foreign Affairs, coordinate for timely settlement when the grievances, complaints, denunciations and lawsuits may lead to international investment disputes; to coordinate in settling arising international investment disputes in accordance with the laws.

Secondly, the Decree provides the list of business lines with limited market access by foreign investors, specifically as follows:

- To officially promulgate the list of business lines with limited market access by foreign investors (Appendix I of Decree 31), containing: (i) business lines not yet permitted for market access (25 business lines); and (ii) business lines permitted for market access with conditions (59 business lines). Simultaneously, the list of conditions for market access will be reviewed, gathered and publicized on the National Investment Portal;
- Principle of application: foreign investors (i) are not allowed to make investment in business lines not yet permitted for market access; (ii) must qualify the required market access conditions in conditional market access business lines; and (iii) shall be treated equally in market access as domestic investors except for the business lines specified in Appendix I of Decree 31.

Thirdly, Decree 31 introduces detailed provisions on the subject of application, procedures for investment project adjustment in circumstances arising during effective period of the Law on Investment 2014 but not yet recognized and specifically guided in legal normative documents, making it difficult for both investors and state agencies, such as: (i) adjustment of investment projects in case where investors receive transfer of such projects as collateral; (ii) adjustment of investment projects in case of investment project division, separation or merger; (iii) adjustment of investment projects in case of using land use right or land-attached assets under the investment projects to make capital contribution; and (iv) adjustment of investment projects in case of using land use right or land-attached assets under the investment projects for business cooperation.

Fourthly, Decree 31 provides guidelines for application of the Law on Investment 2020's new provisions on suspension of investment projects. In the event where investors make decisions on investment project shutdown, the total downtime shall not exceed 12 months. Investors shall notify the Investment Registration Agency under Form A.I.13 Circular 03/2021/TT-BKHDT providing the form of documents and reports related to investment activities in Viet Nam, offshore investment from Viet Nam and investment promotion (**Circular 03**) within 05 business days from the date of the decision on project shutdown. The Investment Registration Agency will then receive and notify the investment project suspension to relevant agencies under Form A.II.14 prescribed under Circular 03.

Comments and recommendations

Firstly, the mechanism of investors' grievance resolution and State-investor dispute prevention under Decree 31 has clearly bound the responsibilities of the Ministry of Planning and Investment as well as other competent Ministries and state agencies in improving the efficiency in resolving investors' grievances. Whereby, investment activities in Viet Nam will be ensured to be conducted smoothly.

Secondly, the promulgation of the application principle and publication of the list of business lines with limited market access by foreign investors will unravel one of the gravest problems of foreign investors when entering into Vietnamese market – researching investment conditions in each field, which are currently regulated scatteredly in many specialized legal documents.

Thirdly, the supplement of detailed provisions on investment project adjustment order and procedures which have not yet been specifically guided have removed problems encountered by investors and state agencies, minimized time and compliance cost as well as granted more opportunities for investors to implement M&A transactions in more diversified forms.

In addition to the listed contents, investors should pay attention to review and understand new and notable points of Decree 31 such as: implementation of online investment procedures, extension of subjects of investment incentives, determination of areas eligible for investment incentives, as well as certain contents of by-law documents relative to investment amended and supplemented in Chapter IX of Decree 31 (on determination of investment projects using land, regulations on exemption or reduction of land rent, etc.) to apply in business investment process.

COMMENTS ON THE DRAFT LAW AMENDING AND SUPPLEMENTING SOME ARTICLES OF THE INTELLECTUAL PROPERTY LAW

TUE DANG

*The Intellectual Property Law (**IP Law**) was first adopted in 2005. After more than 15 years of its implementation and 02 amendments in 2009 and 2019, the IP Law has played an important role in maintaining a legal framework for the establishment, exploitation and protection of IP rights for intellectual assets of organizations and individuals in Viet Nam. At present, the IP Law is being amended and supplemented (**the Draft IP Law**) to overcome several problems arising in practice, ensuring conformity to the current science and technology development and meeting the commitments under the international treaties Viet Nam has engaged in. In this Legal Newsletter, NHQuang would provide our analyses for the Draft IP Law's salient matters which may impact organizations and individuals having rights and interests related to the intellectual assets.*

Supplementing the provision that sound can be registered as a trademark

The supplementation of the sound to be considered for protection as a trademark is an advanced provision in line with Viet Nam's commitments under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (**CPTPP**). Although sound is different from traditional trademarks due to its invisible nature, it has been used and combined with products or services of various businesses. Accordingly, the demand to register IP rights for sound has been in existence for many years. Regarding the forms of representation, the Draft IP Law stipulates that sound signs are shown in graphical representation. The graphical representation has not been addressed and described in detail in the Draft IP Law, however, it may be guided and specified in the following Circular or Regulation guiding the implementation (for example, graphical representation may be in the form of staff drawings, lyrics, sound wave charts, etc.)

Supplementing the circumstance of trademark certificate invalidation if trademarks become generic term

In fact, the applicable IP Law provides that a mark shall be assessed as indistinctive if it is the generic term of goods or services. However, such assessment only takes place in the official examination for considering the grant of trademark certificates. For example, the "Vaseline" mark applied to cover skincare products has been rejected by Vietnam Intellectual Property Office (**VNIPO**) since it is determined as a generic, common and essential designation of goods. This supplemented provision of the Draft Law aims to address the potential transformation of a mark to a generic term after being protected. It means that a trademark may not be secured with 100% protection even if it has passed the VNIPO's examination and acquired the trademark certificate, since such trademark certificate can be still invalidated if there is a basis to determine that the trademark becomes a "generic term". In the market, there are many trademarks for which trademark certificates are granted but they gradually become indistinctive due to the process of transforming to the generic name of products or services. In some cases abroad, trademarks may even lose the protection as a result of court judgments. This new provision of

the Draft IP Law is relevant to the practical context and Viet Nam's commitments in the European Union-Vietnam Free Trade Agreement (**EVFTA**).

Providing a separate provision on mechanism for opposition against industrial property registration applications

The Draft IP Law provides a separate provision on the procedures for opposition against applications for industrial property registration in Article 112a. In practice, prior to the draft Article 112a, a third party's opposition against an application for industrial property has taken place, relying on Article 112 of the applicable IP Law on "third party's opinions on the grant of protection certificates". However, relevant individuals and companies should note the time-limits for filing their opposition as mentioned in Article 112a of the Draft IP Law: (a) 09 months from the date when an application for invention registration is posted, (b) 04 months from the date when an application for industrial design is posted, (c) 05 months from the date when an application for trademark registration is posted, and (d) 03 months from the date when an application for geographical indication registration is posted. In addition, opposition petitions must be prepared in writing, attached with documents and citing relevant information for illustration and the opposing party must pay fees and charges as regulated.

Supplementing the "bad faith" element to the act of unfair competition related to domain names

Clause 1 Article 52 of the Draft IP Law adds the "bad faith" element to unfair competition acts specified at Point d Clause 1 Article 130 of the IP Law as follows: *"d) Registering, possessing the right to use or using domain names identical with, or confusingly similar to, the protected trade names or marks of others, or geographical indications without having the right to use, for the purpose of possessing such domain name with bad faith, benefiting from or prejudicing the reputation and popularity of the respective mark, trade name or geographical indication."* This supplement aims to ensure the compliance with information technology and telecommunications legislation as well as compliance with international laws, specifically Article 18.28 of the CPTPP. In addition, it seems that the above-mentioned provision is a reference to the provisions of the Uniform Domain Name Dispute Resolution Policy ("**UDRP**") of the Internet Corporation for Assigned Names and Numbers ("**ICANN**"), since the "bad faith" element is one of the three conditions for ICANN to consider canceling a domain name. However, the Draft IP Law has not specified the "bad faith" element and this may be provided further in its guiding documents. Referring to UDRP's guidelines, the registration and use of a domain name with "bad faith" may include the circumstances where the registrant registers the domain name (i) for the purpose of selling, leasing, or transferring a domain name to the trademark owner or competitors of the trademark owner, (ii) in order to prevent the trademark owner from reflecting the mark in a corresponding domain name, (iii) for the purpose of disrupting the business of the competitors, (iv) for intentionally attempting to attract the internet users to the website for commercial gain.

At the moment, the Draft IP Law is still being finalized and multiple provisions thereof are being considered with various draft options. Therefore, the interested enterprises should pay attention to frequently monitor the drafting process of the Draft for timely and accurate update of its regulations.

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