



**Forms of Doing Business
in Vietnam 2019**

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List of Acronyms

AFTA	ASEAN Free Trade Area
ASEAN	Association of South East Asian Nations
BCC	Business Cooperation Contract (under the LFI and Investment Law)
BOM	Board of Members
BOO	Build-Own-Operate
BOT	Build-Operate-Transfer
ERC	Enterprise Registration Certificate
BT	Build-Transfer
BTO	Build-Transfer-Operate
CEO	Chief Executive Officer
CEPT	Common Effective Preferential Treatment
DOIT	Department of Industry and Trade
EIT	Enterprise Income tax
FIC	Foreign Invested Company
GSM	General Shareholders Meeting
JSC	Joint Stock Company
LFI	Law on Foreign Investment in Vietnam
LLC	Limited Liability Company
MFN	Most Favored Nation
MOF	Ministry of Finance
PC	Partnership Company
PIT	Personal Income Tax
PSC	Production Sharing Contract
PPP	Public – Private Partnership
RO	Representative Office

SBRA	State Business Registration Authority
SIRA	State Investment Registration Authority
VAT	Value Added Tax
WTO	World Trade Organization



1. Introduction

Since Vietnam first opened its doors to foreign direct investment in the late 1980s, the primary way to establish a long-term corporate presence in Vietnam had been to set up a foreign invested company (“**FIC**”) under the *Law on Foreign Investment in Vietnam of 1996* (“**LFI**”) and its predecessor, the 1987 *Law on Foreign Investment*.

Since 1 July 2006, the *Enterprise Law 2005* and the *Investment Law 2005* superseded the *LFI* to be the main legislative frameworks governing matters relating to foreign investment in Vietnam, reflecting Vietnam’s desire to attract foreign investment to the country.

Nearly 10 years after the adoption of the above-mentioned two legislations, on 26 November 2014, the National Assembly passed the *Investment Law 2014* and *Enterprise Law 2014*, replacing the *Investment Law 2005* and the *Enterprise Law 2005* as of 1 July 2015. These laws adopt a more pro-investor approach, aiming to reduce administrative bureaucracy and better facilitate foreign investment into Vietnam.

This publication outlines the corporate vehicles that are available to foreign investors and traders for conducting business operations in Vietnam under *the Investment Law 2014 and the Enterprise Law 2014*, and alternative means for establishing a business presence in Vietnam.

2. Investment under the Investment Law 2014 and the Enterprise Law 2014

Per the *Investment Law 2014*, foreign investors or enterprises with a certain amount of foreign ownership undertaking a project are required to complete investment registration formalities before the relevant provincial level State Investment Registration Authority (“**SIRA**”), which will issue them with investment registration certificates (“**IRC**”).

Per the *Enterprise Law 2014*, every enterprise must receive an enterprise registration certificate (“**ERC**”) prior to beginning operations, which will be issued by the provincial-level State Business Registration Authority (“**SBRA**”). The ERC sets out the corporate details of such enterprise, including its amount of charter capital. The specific scope of business activities that an enterprise is permitted to undertake in Vietnam will be recorded on the National Enterprise Registration Information Gateway for public research.

The *Investment Law 2014* and the *Enterprise Law 2014* stipulate that an FIC established before the *Investment Law 2014* and the *Enterprise Law 2014* has the option to:

- (1) continue its operation in accordance with its current investment license or investment certificate without re-registration; or
- (2) request the SIRA to convert its current investment license or investment certificate into the IRC.



3. The Forms of Investment

3.1 The Forms of Investment

Foreign investment projects in Vietnam can take the form of any of the following investment vehicles:

1. The Limited Liability Company (“**LLC**”);
2. The Joint Stock Company (“**JSC**”);
3. The Partnership Company (“**PC**”);
4. The Business Cooperation Contract (“**BCC**”); and
5. Public – Private Partnership (“**PPP**”) projects.

Strictly speaking, a PPP project may be implemented by a project enterprise that has been set up under the form of an LLC or JSC, albeit with certain distinguishing legal characteristics, rather than as a separate form of foreign investment.

3.1.1 The LLC (Multiple Member LLC and Single Member LLC)

An LLC may take the form of either an LLC with two or more members (“**Multiple Member LLC**”) or an LLC with one member (“**Single Member LLC**”). An LLC has its own charter and Board of Members (“**BOM**”), which is akin to a GSM of a JSC, and has the right to establish dependent units such as branches or ROs domestically or abroad.

An LLC has the status of a recognized legal entity and a member of an LLC is responsible for the debts and liabilities of the enterprise to the extent of the amount of capital that the member has contributed or committed to contribute to the enterprise. An LLC does not issue shares.

(a) Multiple Member LLC

A Multiple Member LLC is an enterprise that has more than one but no more than fifty members, which may be organizations, individuals, or a combination of both.

(i) Rights of a Member

A member of a Multiple Member LLC has the right, among other things, to:

- attend meetings of the BOM;
- cast votes in a number that is proportionate to its capital contribution;
- be distributed shares and profits proportional to its capital contribution; and
- be given priority in contributing additional capital.

Subject to the right of first refusal (i.e., members wishing to transfer all or part of their capital must first offer to sell such portion of capital to all other members proportionately), a member can transfer, dispose of or ask the company to buy back its capital contribution portion in accordance with the *Enterprise Law 2014* or as stipulated in the company charter.

(ii) Management and Control

The BOM is the highest decision making body of a Multiple Member LLC, and its members are appointed in proportion to their respective capital contribution portions.

A Multiple Member LLC having 11 members or more must also establish a Control Committee. A Multiple Member LLC having less than 11 members may also establish a Control Committee as appropriate for its management requirements.

(iii) Meetings

The chairperson of the BOM, or a member or group of members, that own 10% or more (or a lower percentage as stipulated in the company charter) of the charter capital (the "**default minority members**") can call a meeting of the BOM. In the event that the company has one member owning more than 90% of the charter capital and its charter does not stipulate another smaller proportion for the default minority members, the minority members acting jointly will automatically have the right to call a meeting.

A quorum is established when members representing at least 65% of the charter capital are present, or a higher threshold as stipulated by the company charter. If the first meeting fails to have the necessary members to constitute a quorum, a second meeting may be convened within the 15 days following the first meeting and the second meeting must have members representing at least 50% of the charter capital or or a higher threshold as stipulated by the company charter. If the second meeting does not meet the quorum, a third meeting may be held within 10 working days, at which time the meeting is conducted irrespective of attendance.

The company charter stipulates the frequency of BOM meetings, but the BOM must meet at least once a year.

(iv) Voting

Resolutions can be adopted by means of voting at a meeting, seeking written opinions (i.e., written resolutions in lieu of a meeting), or by other methods as provided in the company charter (e.g., by electronic means, such as video conferencing).

Resolutions will be adopted at meetings when such resolution is approved by a number of votes representing at least 65% of the total contributed capital of the members attending the meeting or a higher threshold as stipulated by the company charter, except for when such resolutions would require a higher voting threshold as discussed below.

A resolution on any of the following matters will be adopted at meetings when such resolution is approved by a number of votes representing at least 75% of the total contributed capital of the members attending the meeting or a higher threshold as stipulated in the company charter:

- A sale of assets/property with a value equal to or greater than 50% of the total value of assets (as stated in the company's latest financial report or a smaller proportion stipulated in the company's charter);
- A resolution on an amendment and supplement to the company's charter; or
- A resolution on the company's reorganization or dissolution.

A resolution adopted by means of seeking written opinions, must be approved by a number of members representing at least 65% of the charter capital or a higher threshold as stipulated in the company charter.



(v) Managerial Personnel

A Multiple Member LLC must have one director or general director¹ of the company appointed by the BOM, who may or may not be a member of the company. The general director is responsible for the day-to-day operation of the company and is often the legal representative of the company, although the charter may provide otherwise.

(b) Single Member LLC

A Single Member LLC is owned by one organization or individual member (“**Company Owner**”) who is liable for the debts and other liabilities of the company to the extent of the amount of the charter capital of the company. A Single Member LLC has the same legal status as a Multiple Member LLC, but the Company Owner has more autonomy with regards to decisions made about the company. The Company Owner may either appoint a representative to be the president or may create a BOM comprising of three (3) to seven (7) appointed representatives, which will implement the Company Owner’s rights and obligations on its behalf.

Meetings of the BOM (if the company has one) must have at least two-thirds of the representatives present; and each representative has a vote of equal validity, or as stipulated otherwise under the company charter. A resolution of the BOM is adopted when it is approved by more than a half of the number of attending representatives. An amendment or supplement to the company charter, company reorganization and a transfer of all or part of the charter capital of the company must have the approval of at least three-quarters of the number of representatives attending the relevant meeting.

Similar to a Multiple Member LLC, a Single Member LLC must have a director or general director appointed by the president or the BOM, who is responsible for the day-to-day operation of the company and is often the legal representative of the company, although the charter may provide otherwise.

A Single Member LLC must have controllers and the Company Owner can decide the number of controllers who are responsible for supervising the performance of the BOM (or the President) and the director (or general director), and carrying out other tasks assigned by the Company Owner.

A Single Member LLC may reduce its charter capital in any of the following two cases:

- Where the company returns a part of the contributed capital in the company’s charter capital to the Company Owner, provided that the company has been in business operation continuously for more than two (2) years as from the date of registration of the enterprise and the company can ensure that the company’s debts and other asset obligations can still be paid fully after the return has been made to the Company Owner; or
- Where the Company Owner has not paid fully and in a timely manner the company’s charter capital.

A Single Member LLC may increase its charter capital by way of additional investment from the Company Owner or by obtaining capital contributions from other persons. In the event that part of the charter capital is contributed by or transferred to another organization or individual, the company must register to convert into a Multiple Member LLC or a JSC within 10 days from the date of completion of the transfer.

¹ The General Director or Director under Vietnamese law is equivalent to a CEO or a General Manager.

3.1.2 The Joint Stock Company

A JSC is an enterprise whose charter capital is divided into shares held by three or more organizations or individuals. Shareholders are responsible for the debts and liabilities of the enterprise to the extent of the amount of their contributed capital. A JSC has the right to issue securities in order to raise capital and it may list on the Securities Exchange.

The JSC must have common shares and may have preferred shares and/or issue bonds. A common shareholder has the right, among other things:

- to attend the General Shareholders Meeting (“GSM”);
- to vote in a number that corresponds to his/her/its amount of shares;
- to receive dividends, to transfer his/her/its shares; and
- to be given priority in buying new shares offered for sale corresponding to his/her/its amount of common shares.

A JSC has the right to select its organizational, managerial and operational structure in accordance with one of the two following options (except where securities laws provides otherwise):

- Option 1: GSM, the Board of Management, Control Committee and the (General) Director. Where a JSC has fewer than 11 shareholders, and the shareholders being organizations holding less than 50% of the total company shares, there is no requirement for a Control Committee.
- Option 2: GSM, Board of Management and (General) Director. In this case, at least 20% of the members of the Board of Management must be independent and an Internal Auditing Committee must be established directly under the Board of Management.

(a) General Shareholders Meeting

A GSM consists of all shareholders having the right to vote and is the highest decision-making body of a JSC. Its main powers include, among other things:

- adopting the company’s development orientation;
- deciding on the types/classes of shares and the total number of shares in each type/class authorized to be offered for sale; and deciding on the annual dividend rate for each type/class of shares;
- elect, relieve duty of and discharge, the members of the Board of Management and members of the Control Committee;
- deciding on an investment or a sale of assets/property, with a value equal to or greater than 35% of the total value of assets stated in the most recent financial statements of the company, if the company’s charter does not stipulate a different proportion or value;
- deciding on the amendment and/or supplement to the company’s charter;
- adopting annual financial statements;
- deciding on a buy-back of more than 10% of the total number of shares in each type/class that have been sold;



- reviewing and handling violations committed by the Board of Management and/or Control Committee which cause damage to the company and the company's shareholders;
- deciding on a company reorganization or dissolution; and
- other rights and duties under the provisions of the *Enterprise Law 2014* and the company charter.

The GSM may meet annually or extraordinarily, at least once a year. The annual meeting must be held within four months from the ending date of the financial year. The meeting venue for the GSM must be within the territory of Vietnam. In the event that a GSM is held concurrently in several different venues, the meeting venue of the GSM is determined to be the venue where the chair attends the meeting.

The quorum of the meeting is at least 51% of the total number of voting shares. If the first meeting fails to meet this quorum, the quorum for the second meeting is at least 33% of the total number of voting shares. If the second meeting fails to meet this quorum, the third meeting will be held irrespective of the quorum.

Resolutions of the GSM are adopted at a meeting when they are approved by a number of shareholders representing at least 51% (or more as may be provided in the company's charter) of the total number of voting shares of all shareholders attending the meeting. A percentage of at least 65% (or more as may be provide in the company's charter) will be required for the resolutions relating to the following issues:

- Decision on the types/classes of shares and the total number of shares in each type/class authorized to be offered for sale;
- Change in the scope of business of the company;
- Change in the company's management structure;
- The company's re-organization or dissolution;
- An investment or sale of assets/property with value equal to or greater than 35% of the total value of assets stated in the most recent financial statements of the company (unless the company's charter stipulates a different proportion); and
- Other matters stipulated under the company charter.

As an exception, cumulative voting can be used for the election of members to the Board of Management and the Control Committee.

A resolution of the GSM will be adopted by way of written opinion if it is approved by at least 51% (or more as may be provided in the company's charter) of the total number of voting ballots.

(b) Board of Management

The Board of Management is the managing body of a JSC consisting of not less than 3 members and not more than 11 members. The specific number of members will be provided by the company charter. Board of Management members are elected by the GSM by way of cumulative vote (unless another appointment method is provided in the company's charter) for a term of up to 5 years and can be re-elected.

Generally speaking, the Board of Management has the full authority, in the name of the company, to make decisions, exercise the company's rights and perform the company's obligations that do not fall under the authority of the GSM.

The Board of Management may meet periodically or extraordinarily. The Chairperson will convene a periodical meeting at any time necessary, though the Board of Management must meet at least once every quarter. A meeting of the Board of Management may be conducted when there are three-quarters or more of the total number of its members attending the meeting.

A resolution of the Board of Management may be adopted if approved by the majority of the members attending the meeting; in the event of even votes, the Chairperson has the casting vote.

(c) Director/General Director

The Director/General Director is appointed by the Board of Management for a term of up to 5 years and can be re-appointed. The Director/General Director is responsible for the day-to-day operation of the company.

(d) Control Committee

A Control Committee is required for a JSC (i) choosing Option 1 as its organizational structure and (ii) having 11 or more shareholders who are individuals, or having shareholders being organizations owning 50% or more of the total number of shares of the company.

The Control Committee consists of 3 to 5 members if the company charter does not provide otherwise, and more than half of its members must regularly reside in Vietnam. The Chief Controller must be a professional accountant or auditor and must not concurrently be responsible for any other task at the company (i.e., "*chuyên trách*" in Vietnamese), except where otherwise stated in the company charter.

The Control Committee members are appointed by GSM by way of cumulative vote for a term of up to 5 years and can be re-elected. In general, the Control Committee is responsible for supervising the performance of the Board of Management and the Director/General Director, and carrying out other tasks assigned by the GSM.

3.1.3 Partnership Company

A PC is a form of enterprise set up by at least two partners and has a status of a legal person - a PC is akin to a limited liability partnership in other jurisdictions. A PC must have two general partners and may also have limited partners (literally, "capital contributing members"). General partners are liable for all obligations of the PC with their own property, while limited partners are only liable to the extent of their capital contribution. To date, PCs have not been a common vehicle for foreign investment in Vietnam.

3.1.4 Business Cooperation Contract

A BCC is a contractual relationship akin to a partnership which does not create a new legal entity but which is licensed to engage in business activities in respect of a specific project in Vietnam. BCCs are most commonly used in the oil industry, where production sharing contracts have traditionally been structured as BCCs, and in telecommunications and advertising projects. This is changing as LLCs and JSCs are being allowed into these fields.



3.1.5 Public – Private Partnership (“PPP”)

Investment under the form of PPP is defined as a form of investment conducted on the basis of a contract (“**PPP Project Contract**”) between an authorized State agency (“**ASA**”) and the investor and/or project enterprise in order to implement, manage and operate an infrastructure project or to provide public services.

A PPP Project Contract can take one of the following forms:

- build - operate - transfer (“**BOT**”), which is defined as a contract entered into by an ASA and an investor for the construction of an infrastructure facility, upon completion of which the investor shall have the right to commercially operate such facility for a fixed term; upon the expiry of such term, the investor shall transfer (hand-over) the facility to the ASA;
- build - transfer - operate (“**BTO**”), which is defined as a contract entered into by an ASA and an investor for the construction of an infrastructure facility, upon completion of which the investor shall transfer such facility to the ASA and have the right to commercially operate the facility for a fixed term;
- build - transfer (“**BT**”) contract, which is defined as a contract entered into by an ASA and an investor for the construction of an infrastructure facility; the investor shall transfer such facility to the ASA and shall be paid by way of reserved land in order to implement other projects;
- build - own - operate (“**BOO**”) contract, which is defined as a contract entered into by an ASA and an investor for the construction of an infrastructure facility, upon completion of which the investor shall own and have the right to commercially operate the facility for a fixed term;
- build - transfer - lease (“**BTL**”) contract, which is defined as a contract entered into by an ASA and an investor for the construction of an infrastructure facility, upon completion of which the investor shall transfer such facility to the ASA and have the right to provide services on the basis of operating and exploiting the facility for a fixed term; and the ASA shall lease such services and shall make payment to the investor;
- build - lease - transfer (“**BLT**”) contract, which is defined as a contract entered into by an ASA and an investor for the construction of an infrastructure facility, upon completion of which the investor shall have the right to provide services on the basis of operating and exploiting such facility for a fixed term; the ASA shall lease such services and shall make payment to the investor; upon the expiry of the term for provision of such services, the investor shall transfer the facility to the ASA;
- operate - manage (“**O&M**”) contract, which is defined as a contract entered into by an ASA and an investor to commercially operate a facility partly or entirely for a fixed term; and
- any other similar forms of contract to be approved by the Prime Minister.

The PPP investment form is encouraged and eligible for a number of investment projects in construction, renovation, operation, business activities, management of infrastructure facilities, provision of equipment or public services in the following sectors:

- Transport infrastructure facilities and related services;
- Lighting systems; water supply systems; drainage systems; waste and wastewater collection and treatment systems; social housing, resettlement housing, cemeteries;
- Power plants, electricity transmission lines;

- Infrastructure facilities in healthcare, education, vocational training, culture, sports and other related services; office buildings of state agencies;
- Commercial infrastructure facilities, science and technology, hydro-meteorological facilities, economic zones, industrial zones, high technology zones, information technology focused zones and information technology applications;
- Agricultural and rural infrastructure facilities and development services for connecting production with processing, as well as the actual sale of agricultural products; and
- Other investment sectors as decided by the Prime Minister.

Procedures for investment in a PPP project may involve the following steps:

- **Project proposal:** The Government must arrange formulation of project proposals and announce the project and a list of projects on the national bidding network. The law also allows for investors to propose implementation of PPP projects outside the projects and lists of projects approved and announced by the Government.
- **Feasibility study report:** The Government shall arrange formulation of the feasibility study report for a project in order to provide the basis for tender invitation documents for investor selection and for negotiation of the PPP project contract. For investor-proposed projects, the investor can be assigned to formulate the feasibility study report.
- **The selection of investors for PPP projects:** International open bidding is compulsory for PPP projects, except in limited cases where national open bidding or direct appointment are permissible.
- **Project contracts:** After completing negotiation of the project contracts (e.g., BOT contract, government guarantee, etc.), the Government and the investor will sign an investment agreement (which contains draft project contracts) to confirm the draft of the project contracts, and will officially sign the project contracts after an IRC has been issued.
- **Establishment of the project enterprise:** Upon issuance of an IRC, the investor must establish an enterprise to implement the PPP project, except for PPP projects implemented under a BT contract or small scale projects.

3.1.6 Term and Termination under the Investment Law 2014 and the Enterprise Law 2014

An enterprise may terminate in the following cases:

- The operational duration stated in the charter expires and there is no decision to extend;
- As decided by the BOM or the Company Owner or the GSM;
- The enterprise does not have the required minimum number of members or shareholders for a period of six consecutive months and it does not carry out the formalities for converting the form of enterprise; or
- The ERC is revoked.

In the event that an enterprise terminates of its own volition, it will only be allowed to do so once it has discharged all debts and property obligations.

An investment projects terminate in the following circumstances:



- The investor decides to terminate the project operations;
- Conditions for termination of operations (as stipulated in the relevant contract, enterprise charter, etc.) have been met;
- The duration of the project expires ; or
- The investment project falls into cases provided under the Article 47.2 or Article 47.3 of the Investment Law 2014² and the investor is incapable of remedying the conditions for ceasing the activities;
- Where the land for the investor to implement the project is resumed by the State or where the investor is not permitted to continue to use the investment site and fails to complete the formalities for changing the place of investment within six months from the date on which the decision resuming the land is made or the time the investor is no longer permitted to use the investment site;
- Where the activities of the investment project have ceased and the SIRA cannot contact the investor or the investor's legal representative upon the expiry of a period of 12 months from the date of cessation of the activities;
- The investor fails to implement or is incapable of implementing the project in accordance with the schedule registered with the SIRA after a period of 2 months has lapsed and the investor does not fall into the category eligible for lengthening the schedule for implementing the investment project; and
- Under a decision or judgment of a court or arbitral body.

3.2 Investing in Domestic Vietnamese Enterprises – Limitations on Foreign Ownership

3.2.1 Purchasing Shares or Charter Capital

In general, foreign investors may invest in Vietnamese enterprises by way of taking any of the following ways:

- Purchasing capital contribution portions from existing members in LLCs;
- Contributing new capital into LLCs;
- Purchasing existing shares from shareholders of JSCs; and
- Subscribing for new shares in JSCs.

² Article 47.2 of the Investment Law 2014 provides that:

"The State administrative agency for investment shall make a decision to suspend all or part of the operation of an investment project in the following circumstances:

(a) To protect monuments, heritage, antiques or national precious objects in accordance with the Law on Cultural Heritage;

(b) To remedy an environmental offence upon request of the State administrative agency for environment;

(c) To take measures to ensure labour safety upon request of the State administrative agency for labour;

(d) Under the decision or judgement of a court or arbitration body;

(dd) The investor fails to correctly implement the content of the IRC and has been dealt with for an administrative offence but continues to commit the offence."

Article 47.3 of the Investment Law 2014 provides that:

" The Prime Minister of the Government shall make a decision to suspend all or part of the operation of an investment project in the case where the implementation of the investment project is at risk of affecting the national security upon request of the Ministry of Planning and Investment."

The *Investment Law 2014* does not distinguish between the purchase of shares or charter capital as a direct or indirect form of investment. Acquisitions of shares or charter capital only trigger the obligation to register the acquisition with the SIRA in two cases - i.e., the purchase of shares or equity by a foreign investor into:

- an enterprise operating in business sectors where foreign investors are subject to conditions; or
- a target enterprise results in foreign investors owning 51% or more charter capital of the targeted enterprise.

The target Single Member LLC or Multiple Member LLC will need to subsequently register for the issuance/amendment of its ERC, unlike in a case where the target enterprise is a JSC where no further ERC amendment is required.

3.2.2 Merger, Consolidation, Division and Separation

The *Enterprise Law 2014* defines merger, consolidation, division, and separation as follows:

- Enterprise merger is a process whereby one or a number of enterprises transfers all of its assets, legal rights, liabilities and benefits for the purpose of merging with another enterprise.
- Enterprise consolidation is a process whereby two or more enterprises combine all of their assets, legal rights, liabilities and benefits for the purpose of consolidating among themselves so as to become a new enterprise.
- Enterprise division is the process whereby an LLC or a JSC may split up its members/shareholders and assets to establish two or more new enterprises in the following cases:
 - a portion of capital/shares of members/shareholders, along with the respective assets, is divided between the new enterprises by the ownership ratio in the original enterprise and in correspondence with the assets transferred to the new enterprises;
 - all the portion of capital/shares of one or more members/shareholders, along with the respective assets, is transferred to the new enterprises, or
 - both of the above.
- Enterprise separation is the process whereby an LLC or a JSC splits off, where a part of the assets/property, rights and obligations of an existing enterprise (i.e., the separating enterprise) are transferred to establish one or more new enterprises (i.e., the separated enterprises).

These forms of enterprise restructuring take effect upon the approval of the relevant SBRA. After enterprise reorganization, various rights and obligations will cease to exist, while the parties involved would assume others.

Other notable points include:

- After a merger is completed, the target enterprise will cease to exist and the surviving enterprise will assume the legal rights and interests of the target enterprise. Additionally, the surviving enterprise will be liable for unpaid debts, labor contracts, property obligations and other liabilities of the target enterprise.
- With respect to an enterprise consolidation, the consolidating enterprises will cease to exist upon completion of consolidation and the consolidated enterprise will assume the legal rights



and interests, and is liable for the unpaid debts, labor contracts and other liabilities of the consolidating enterprises.

- With respect to an enterprise division, the original enterprise will disappear and the newly established enterprises will be jointly liable for the unpaid debts, labor contracts and other liabilities of the original enterprise. However, the new enterprises may make agreements with creditors, customers and employees in order for one of them to perform these obligations.
- With respect to an enterprise separation, the separating enterprise and the separated enterprise will be jointly liable for the unpaid debts, labor contracts and other liabilities of the separating enterprise, except where the separating enterprise, the separated enterprise, and the creditors, customers and employees of the separating enterprise agree otherwise.

3.2.3 Acquisition of Assets

An onshore enterprise could also acquire some or all of the assets of another enterprise. For this purpose, assets of an enterprise which may be acquired may include the following:

- valuable papers;
- bonds, debts and other forms of borrowing;
- contractual rights and comprising intellectual property rights, including trademarks, industrial designs, inventions, trade names, origin or appellations of origin of goods;
- rights with respect to real property, including the right to lease out, assign and mortgage it;
- items of revenue derived from investment activities, including profits and interest on shareholding, dividends, royalties and all types of fees;
- other assets and rights with economic value in accordance with law and international treaties to which Vietnam is a member.

3.2.4 Competition Rules on Economic Concentration

On 12 June 2018, the National Assembly of Vietnam passed the new *Competition Law* ("**Competition Law**"), which took effect on 1 July 2019. The *Competition Law* introduces, among other things, a new definition for "economic concentration" and new thresholds.

The definition of "economic concentration" under the *Competition Law* includes the "*direct or indirect acquisition of the whole or part of the contributed capital or assets of another enterprise sufficient to control or influence the acquired enterprise or all or one of the business lines of the acquired enterprise*".

A draft decree on the interpretation of the new law has been published that suggests a broader test for "control" (i.e., beyond the acquisition of 50% of the voting rights) in line with the EU, China and other jurisdictions ("**Draft Decree**").³ Article 2.1 of the Draft Decree defines "control" as follows:

"*Controlling or influencing*" an enterprise or a business line of an enterprise (i.e., the "acquired enterprise") means that another enterprise owns more than 50% of charter capital [of the acquired enterprise]; or 50% of the total voting rights [of the acquired enterprise]; or at a level that pursuant to laws, charter [of the acquired enterprise] or other agreements, such enterprise has one of the following rights [with respect to the acquired enterprise]:

³ As of 05 August 2019, the Draft Decree has not been adopted by the Vietnamese Government. While our assessment is based on the latest Draft Decree made available to the public it is uncertain whether any changes will be made when the Decree is finally adopted.

- (a) the right to directly or indirectly decide on the appointment, dismissal or removal of a majority or all members of the board of management, the chairman of the board of members, the director or general director [of the acquired enterprise];
- (b) the right to decide on the amendment or supplementation to the Charter [of the acquired enterprise];
- (c) the right to participate in important decisions regarding financial policies and operations [of the acquired enterprise], in order to obtain economic interests from the operations [of the acquired enterprise]; or
- (d) the right to own or use all or a majority of the assets [of the acquired enterprise] within all or one of the business lines [of the acquired enterprise].

The Competition Law sets out a number of thresholds that will trigger a notification of economic concentration. This is, in practice, likely to mean that many more deals will require notification. Based on the Draft Decree, an economic concentration will be notifiable where:

- (a) the total assets in the Vietnam market of (i) the enterprise or (ii) the group of affiliated enterprises of which the enterprise is a member reach VND2 trillion (approx. US\$86 million)⁴ or more; or
- (b) the value of the transaction is VND1 trillion (approx. US\$43 million) or more; or
- (c) the total turnover of sales or turnover of purchases in the Vietnamese market of (i) the enterprise or (ii) the group of affiliated enterprises of which the enterprise is a member reach VND2 trillion (approx. US\$86 million) or more; or
- (d) the combined market share of the participating entities in the relevant market, from the year prior to the notification, is 20% or above.

3.2.5 Foreign Ownership Limitations

At present, foreign investors may purchase capital contribution or shares in domestic Vietnamese companies with no limitation, subject to the following restrictions:

- The cap on foreign investment in public companies⁵ is 49% of the total share capital. If Vietnam committed to allow foreign ownership in certain business lines to be more than 49%, then foreign investors may hold shares in a public company doing business in such business lines up to the ratio allowed by such commitments by Vietnam, including up to 100% foreign ownership;
- The cap on foreign investment in enterprises doing business in certain sectors where specialized laws provide for foreign ownership must comply with such provisions (e.g., a cumulative 30% limit applies to banks);
- The cap on foreign investment in enterprises doing business in service sectors will be in accordance with Vietnam's bilateral and multilateral commitments (for example, Vietnam's WTO Schedule of Commitments, ASEAN Framework Agreement on Services, Vietnam - Japan Economic Partnership Agreement, etc.); and

⁴ This is based on the exchange rate of VND23,255 equal to US\$1 which is applied to all USD amounts converted from VND amounts in this publication.

⁵ A public company is a JSC that (i) has already conducted the public offering of its stocks; or (ii) has its stocks listed at a stock exchange; or (iii) has its stocks owned by at least one hundred investors, excluding professional securities investors; and has a contributed charter capital of VND10 billion or more.



- The cap on foreign investment in enterprises with 100% State owned capital undergoing equitization or converting their form by other methods will be in accordance with the plans approved by competent authorities.

In July 2019, the MOF, on behalf of Vietnamese Government, has released an updated draft of the new Law on Securities (the "**Draft Securities Law**") with a view to improving the current legal framework for the securities market by further aligning it with the overall development scheme of the Vietnamese financial sector. As contemplated under the Draft Securities Law, it may take effect from 01 January 2021.

As discussed above, under the current regulations, if a public company conducts business within certain business lines that are subject to conditions imposed on foreign investors, and in which there is no specific provision on the foreign ownership limitation (the "**Undetermined Conditional Sectors**"), the foreign ownership limitation will be capped at 49% of the voting capital. If a public company wishes to lift its foreign ownership ratio above 49%, it has to prove that none of its business lines falls under the Undetermined Conditional Sectors, which is neither easy nor straightforward.

The Draft Securities Law now delegates such matters to the Government. In particular, Article 51 of the Draft Securities Law stipulates that any limitation on foreign ownership or condition, procedure for investment and participation of foreign investor/organization with foreign capital, will be in accordance with the further guidance and regulations released from the Government.

According to the Government's Explanatory Statement for the Draft Securities Law, in order to establish a proper plan to open market access for foreign investors, as well as create sufficient room for negotiation over certain international treaties, detailed regulations on the foreign ownership cap should be provided by the Government.

4. The Approval Process for Foreign Investors

4.1 Investment Registration Certificate (IRC)

Foreign investors must have an investment project and obtain an IRC, by submitting an application dossier to the SIRA. The competent SIRA for a specific investment project will be determined based on the location where the foreign investor proposes to implement its investment project, which can be:

- the Management Authority of the industrial zone, export processing zone, high technology zone or economic zone, or
- the Foreign Investment Division under the provincial-level Department of Planning and Investment.

The *Investment Law 2014* specifies the types of investment projects subject to special consideration and preliminary approval of the National Assembly, the Prime Minister, or the provincial People's Committee. The lists include large projects which are likely to have a major impact on the environment, or projects which require conversion of the land use purpose, or result in relocation and resettlement of more than 10,000 inhabitants, or fall under special business sectors (e.g., construction of air transportation or seaport, casino operations, cigarette production, oil and gas exploitation, golf course construction, etc.).

- In general, the application dossier is likely to take 2 to 4 months to prepare (including the translation and execution of all documents) and submit. The decision to approve and issue the IRC is discretionary, whilst statutorily provided that such decision should be made within 15 days from the date of submission of the application. If the SIRA refuses to issue such an IRC, it must provide a written explanation of the reasons of the refusal to the foreign investor.
- For investment projects subject to special consideration and preliminary approval, the SIRA will forward the submitted application to the National Assembly/the Prime Minister/the provincial People's Committee for their in-principle approval prior to issuing the IRC.

4.2 Enterprise Registration Certificate (ERC)

If a new FIC is being established together with an investment project, upon the issuance of an IRC, the foreign investor will have to apply for an ERC for the establishment of the FIC. Although the laws stipulate that the licensing authority must issue an ERC within 3 working days, in practice, it may take longer.

4.3 Post-Establishment Formalities

Securing an ERC only marks the beginning of the legal life of an FIC. Once the ERC has been issued, a number of subsequent administrative formalities must be undertaken within specific time limits - e.g., tax registration.

4.4 Conditional Investment Sectors for Foreign Investors

The *Investment Law 2014* as amended and supplemented from time to time with the latest amendment in 2016, lists out 243 conditional investment sectors, which are applicable to all enterprises in Vietnam as business conditions (please refer to details of this list in Appendix 1).

The specific investment conditions applicable to investments in these sectors are detailed either in specialized laws governing the particular sector or in international commitments, such as Vietnam's



WTO Commitments on Services (“**Vietnam’s WTO Commitments**”). Vietnam has generally interpreted these commitments as setting limitations on foreign investment/participation in the Vietnamese market.

4.5 Taxation of Foreign Businesses

FICs and foreigners doing business in Vietnam may be subject to a number of taxes, including enterprise income tax (“**EIT**”), value-added tax (“**VAT**”), foreign contractor tax, special consumption tax, and import and export duties.

In general, FICs are subject to the same laws on VAT, EIT and other taxes applied to all business entities and activities in Vietnam. However, the tax liabilities of an FIC, the method of collection, or whether it qualifies for any special tax preferences may vary considerably depending on the form of business. FICs, foreign contractors and branch offices are subject to EIT in Vietnam, and ROs may constitute taxable permanent establishments depending on their activities as defined by law.

Dividends paid by an FIC to its corporate investors are not subject to any tax. However, dividends paid by an FIC to its individual shareholders or individual members of a Multiple Member LLC are subject to withholding Personal Income Tax (“**PIT**”).

4.6 Enterprise Income Tax

The *Enterprise Income Tax Law* (“**EIT Law**”), which took effect on 1 January 2009, was amended in 2014 and 2015.

Since 1 January 2016, the standard EIT rate is 20%⁶. However, enterprises having a total annual revenue of no more than VND20 billion may apply the tax rate of 20% from 1 July 2013. This tax treatment is applicable to any transfer of charter capital other than securities in an enterprise by offshore or local institutional investors.

The transfer of securities (shares of public JSCs and investment fund certificates and bonds, etc.) by offshore institutional investors is subject to a 0.1% EIT rate on the total value of securities sold at the time of transfer.⁷ This is the deemed EIT rate regardless of whether the transfer results in a gain.

EIT is one of the most important forms of taxation in Vietnam for foreign investors and is imposed on FICs and branches who derive income from both within and outside of Vietnam.

Foreign companies located abroad but engaging in business activities in Vietnam or deriving income in Vietnam are also subject to EIT. However, foreign companies from countries that have entered into a double-taxation treaty with Vietnam may be eligible for protection from a certain degree of tax exposure if qualifying conditions are met.

Taxable income by definition is the total turnover minus deductible expenditures, plus other income. EIT is assessed on assessable income, which is the taxable income after further deducting tax-exempt income and losses carried forward. Loss can be carried forward for five years after the year that the loss is incurred. Except for restrictions or caps on deductibility of certain specific expenditures, expenditures are generally tax deductible if the expenses incurred actually relate to the company’s

⁶ Decree No. 218/2013/ND-CP on Detailed Provisions for the Implementation of the Enterprise Income Tax issued by the Government on 26 December 2013 (“Decree No. 218”).

⁷ Circular No. 100/2004/TT-BTC on Providing Guidelines on Value Added Tax and Enterprise Income Tax on Securities issued by the Ministry of Finance on 20 October 2004 (“Circular No. 100”), Part III.2.2, as amended by Circular No. 72/2006/TT/BTC on 10 August 2006 (“Circular No. 72”); Circular No. 103/2014/TT-BTC, issued by the Ministry of Finance on 6 August 2014 (“Circular No. 103”).

business operations, and the expenses are supported with sufficient invoices or vouchers in accordance with the regulations.

4.7 Transfer Pricing

In principle, every transaction is required to be made at market price. Additionally, related party transactions are subject to transfer pricing documentation and reporting.

“Market price” is defined as the price of goods and services based on arm’s length business agreements between unrelated parties. There are five methods for determining prices of related party transactions: Comparable Uncontrolled Price, Resale Price, Cost Plus, Comparable Profit and Profit Split.

Taxpayers are required to submit a report on related transactions (in prescribed form No. 01 provided under *Decree No. 20/2017/ND-CP*) together with the annual tax return to the local tax authorities within 90 days from the end date of the fiscal year, among other reports. In addition, taxpayers are required to prepare and maintain transfer pricing documentation before conducting annual tax finalization including:

- Local File as prescribed in Form No. 02 provided under *Decree No. 20/2017/ND-CP*;
- Global Master File as prescribed in Form No. 03 provided under *Decree No. 20/2017/ND-CP*; and
- Country by country profit report of the ultimate parent company (Country-by-Country Report) as prescribed under Form No. 04 provided under *Decree No. 20/2017/ND-CP*.

During a tax audit, transfer pricing documentation must be provided to the local tax authorities within 15 working days after having their request. During a consultation period before a tax audit, this time limit is 30 working days upon receiving a request from the local tax authorities and it can be extended for an additional 15 working days.

4.8 Tax Incentives

Tax incentives are granted to investment projects based on investment sector, location and large-scale investment capital applicable to manufacturing projects. Tax incentives include preferential tax rates and tax exemption and/ or tax reduction for a certain period. Preferential tax rates include 10%, 15% or 17% for 15 years or for 10 years. Tax exemption can be applicable for four years or two years, and 50% tax reductions can be for nine years, five years or four years.

Investment sectors entitled to tax incentives will be limited to high-tech industries, scientific research and technological development, infrastructure development, software product production, education and training, medical services, sports and cultural activities, and environmental activities. Tax incentives are also granted to enterprises established in industrial zones (except industrial zones located in geographical areas with advantageous socio-economic conditions), economic zones, high-tech zones, geographical areas with difficult socio-economic conditions and geographical areas with especially difficult socio-economic conditions. Since 1 January 2014, under the *Amended EIT Law*, tax incentives are granted to large-scale manufacturing projects. Specifically, manufacturing projects (except for production of goods subject to special consumption tax and exploitation of mineral resources) are eligible for a 10% tax rate for 15 years, a four-year tax exemption and a nine-year 50% tax reduction, if one of the following conditions are met:

- Investment capital is at least VND6 trillion (approximately US\$258 million) and the investment capital is contributed within three years from the issuance date of the investment



certificate and the annual revenue reaches and maintains at least VND10 trillion (approximately US\$430 million) three years after the year starting from when the FIC generates revenue;

- Investment capital is at least VND6 trillion (approximately US\$258 million) and the investment capital is contributed within three years from the issuance date of the investment certificate and the project will have more than 3,000 employees three years after the year starting from when the FIC generates revenue; and
- Investment capital is at least VND12 trillion (approximately US\$516 million) and the investment capital is contributed within five years from the issuance date of the investment certificate and the technology implemented for the project is evaluated in accordance with the Law on High Technology or the Law on Science and Technology.

The EIT Law also provides a research and development tax break. An enterprise established in accordance with Vietnamese law may set aside and contribute up to 10% of the annual assessable income to its research and development fund. Within five years, however, if less than 70% of the fund is used, or the fund is not used for the purposes related to research and development, the enterprise must pay the tax on the unused or misused portion of the fund, coupled with any late payment interest.

No tax incentives are applicable to capital gains, transfer of real estate, transfer of investment projects, income from business activities outside Vietnam, precious mineral resources, oil and gas exploration and exploitation, or electronic games of chance and betting, etc.

4.9 Value Added Tax

The *Value Added Tax Law* (“**VAT Law**”) which took effect on 1 January 2009 and was amended in 2014 2015 and 2016.

4.9.1 Scope of Application and Tax Rates

VAT applies to the supply of goods and services that are deemed to be used “for production, business or other consumption in Vietnam.” A considerable number of goods and services are exempt from VAT. However, it is notable that under the *VAT Law* imported goods, including equipment, machinery, specialized means of transport and construction materials not yet produced locally, are not considered to be tax-exempt supplies, unless they are for scientific research and technological development, or for oil and gas exploration and exploitation activities. Derivative financial transactions are also VAT-exempt.

The *VAT Law* maintains three tax rates of 0%, 5%, and 10%. The standard VAT rate is 10%. Exported goods and services are zero-rated. From 1 January 2014, exported goods or exported services means goods or services consumed outside Vietnam or within tariff-free zones, or provided to customers overseas.

4.9.2 Payment of VAT

Generally, VAT payments are computed and made on a monthly or quarterly basis, based on a credit method which allows a taxpayer to deduct invoiced input VAT incurred from the output VAT charged to customers during the month /quarter. Accordingly, the actual VAT payment consists of net VAT on the value added to the goods or services supplied by the taxpayer. Input VAT incurred for providing VAT-exempt supplies is not creditable. From 1 January 2009, the *VAT Law* requires any payment for each purchase or aggregate purchases from one supplier in one day amounting to VND20 million (approximately US\$860) or more to be made via a bank in order to be eligible for credit of input VAT.

The *VAT Law* also provides for an additional method of computing VAT - direct calculation method- whereby the payable VAT will be mainly assessed directly upon turnover during the supply of goods or services. This method applies to foreign contractors that do not have a permanent establishment in Vietnam; or when the business operation in Vietnam, in accordance with contracts, is less than 183 days; or when the foreign contractor does not adopt the Vietnamese Accounting System for the work in Vietnam. This method also applies to newly established enterprises or current operating enterprises having annual revenue under VND1 billion that choose to apply the said direct calculation method. In addition to VAT, certain goods and services are subject to a special consumption tax at the stage of production, importation, or supply of the service. These goods and services range from cigarettes to golf-related businesses and are defined by the *Special Consumption Tax Law*.

4.10 Special Consumption Tax

Special consumption tax (“SCT”) is imposed on the production or import of taxable goods and the supply of taxable services, including: cigarettes and cigars; spirits and beer; cars with less than 24 seats; motorcycles with a capacity of over 125cc; aircraft and yachts (except those used for transportation or tourism business, and aircraft for national security or defense purposes); gasoline of all kinds; air conditioners with a capacity of 90,000 BTU or less; playing cards and votive paper; and goods and services relating to the operation of dancehalls, massage lounges, karaoke parlors, casinos, electronic prize games, betting entertainment, golf and lotteries. SCT is charged on these goods and services in addition to VAT.

The goods listed above will not be subject to SCT if they are:

- (i) produced for export, including sales to export processing enterprises (except for sales of automobiles with less than 24 seats to export processing enterprises);
- (ii) imported for aid purposes;
- (iii) temporarily imported for re-export or temporarily exported for re-import during the tax payment grace period;
- (iv) belonging to foreign individuals and organizations that enjoy diplomatic immunity;
- (v) personal belongings within the duty-free limit for immigration purposes;
- (vi) imported for sale at duty free shops;
- (vii) imported into tariff-free zones or purchased and sold between tariff-free zones, except where the goods concerned are automobiles with fewer than 24 seats;
- (viii) aircraft or yachts used for transportation or tourism business and aircraft used for national defense and security;
- (ix) special types of vehicles, such as ambulances and mobile television vans;
- (x) air conditioners with a capacity of 90,000 BTU or less that are designed for installation in a means of transportation; or
- (xi) goods are in transit.

4.11 Foreign Contractor Tax

Offshore entities are considered foreign contractors and are subject to foreign contractor tax comprising of VAT and EIT. Offshore business organizations, with or without a permanent establishment in Vietnam, that conduct business in Vietnam or procure income derived from Vietnam



as a result of contracts, agreements, or commitments with organizations or individuals in Vietnam are categorized as foreign contractors and are subject to foreign contractor tax. Additionally, offshore business organizations with or without a permanent establishment in Vietnam that conduct business in Vietnam or gain income in Vietnam by performing only part of the work are considered to be foreign sub-contractors and are also subject to this tax.

When a foreign contractor is a business individual, he/she will be subject to VAT and PIT. The VAT and EIT liabilities of foreign organizational contractors are set forth in accordance with *Circular No. 103*. The sale of goods for which foreign sellers bear risks on goods up to the territory of Vietnam, will expose the foreign sellers to withholding of EIT of 1% on the sales proceeds.

Under *Circular No. 103*, the sale of goods together with associated services performed in Vietnam, such as installation, trial run, warranty, maintenance, replacement, and other services is, taxable. In addition, *Circular No. 103* specifies that foreign suppliers of goods would be exposed to foreign contractor tax in Vietnam in the following circumstances where the foreign supplier:

- bears risks related to goods within Vietnamese territory;
- retains the title to goods delivered to local distributors;
- bears the cost for distribution, marketing, promotion, or is responsible for the quality of goods or service delivered to local distributors;
- determines the selling price of goods or services to third parties;
- authorizes or hires local organizations to perform a part of the distribution service or other services relating to the sale of goods in Vietnam; or
- authorizes a local organization or individual to negotiate and/or sign contracts on behalf of the foreign supplier.

There are three methods of tax payment and calculation: (1) VAT Payment by Offsetting Input VAT Against Output VAT and EIT Payment Based on Actual Assessable Income; (2) Tax Withholding by the Vietnamese Contracting Party; and (3) Hybrid Method of Tax Calculation and Payment Reintroduced. Methods (1) and (3) require more conditions regarding business establishment and operation as compared to Method (2), which is applied by default.

In addition to the aforementioned taxes, foreign business organizations may be subject to other taxes in Vietnam, depending on their scope of business operations. These commonly include taxation of capital and securities assignments and import and export duties.

4.12 Personal Income Tax

PIT in Vietnam is governed by the *Law on Personal Income Tax* (“**Law on PIT**”), which was implemented on 1 January 2009 and amended in 2013 and 2015. Individual tax payers are classified either as ‘residents’ or ‘non-residents’, and are subject to different rates on this basis. The tax rates for residents will depend on the source and the level of income, as outlined in the following tables. Notably, the *Law on PIT* does provide for tax exemptions in certain limited cases.

4.12.1 Tax Rates for Resident Individuals

Tax rates for resident individuals are determined in accordance with progressive tax rates and/or flat tax rates, depending on the source and the level of income as follows:

(a) Progressive Tax Rates

The progressive tax rates apply to a resident’s income from salaries and wages.

Level	Assessable Income Per Year (VND million dong)	Assessable Income Per Month (VND million dong)	Tax Rate (%)
1	Up to 60	Up to 5	5
2	Over 60 to 120	Over 5 to 10	10
3	Over 120 to 216	Over 10 to 18	15
4	Over 216 to 384	Over 18 to 32	20
5	Over 384 to 624	Over 32 to 52	25
6	Over 624 to 960	Over 52 to 80	30
7	Over 960	Over 80	35

In arriving at the assessable income derived from business income, salaries and wages, it is permitted to deduct the following from the taxable income: statutory insurance contributions, voluntary pension fund contribution, qualified charitable contributions, personal deduction of VND9 million (approximately US\$387) per month for a taxpayer, and a deduction of VND3.6 million (approximately US\$155) per month for each eligible dependent.

(b) Flat Tax Rates

The flat tax rate applies to a resident's business income, and income from capital investment, capital transfer, real estate transfer, prizes won, copyright royalties, commercial franchising, inheritances or gifts.

Assessable Income	Tax Rate (%)
Income from capital investments (e.g., dividend payment or interest earnings)	5
Income from royalties and franchises	5
Income from winnings or prizes	10
Income from inheritance or gifts	10
Capital gains from transfer of charter capital	20
Income from securities transfer	0.1
Business income - gross turnover from (i) goods trading, (ii) provision of services and (iii) production, construction, transportation and other business activities	0.5 - 5
Proceeds from real property transfers	2



Hence, the profit gained by a resident individual upon the transfer of his/her capital contribution, other than securities in a business enterprise, is subject to a 20% PIT rate imposed on each transaction. If the transfer is in the form of a securities transaction (including transfer of shares of a non-public joint stock company), the individual will be subject to 0.1% PIT on the total value of securities sold at the time of transfer.

4.12.2 Tax Rates for Non-Residents

Non-residents are subject to tax on income derived from Vietnam. The assessable income of non-residents is the gross income without any deductions.

Assessable income	Tax rate
Business income being gross turnover from (i) goods trading, (ii) provision of services and (iii) production, construction, transportation and other business activities	1% / 5% / 2% respectively
Salaries and wages	20%
Income from capital investments (e.g., dividend payment or interest earnings)	5%
Proceeds from transfer of capital (including both charter capital and securities)	0.1%
Sales proceeds of immovable property	2%
Income from copyright or franchising	5%
Income from prizes, inheritances or gifts	10%

4.13 Double Taxation Treaties

Vietnam has entered into a number of agreements on the avoidance of double taxation. There are 75 such agreements now in effect between Vietnam and various countries / territories.

However, these agreements do not preclude Vietnam from imposing tax on capital gains realized by a foreign investor in certain instances. There are some exceptions to this general rule, mainly with respect to the alienation of aircrafts and ships. Therefore, an investor should consider these agreements when structuring cross-border acquisitions.

The permanent establishment concept was incorporated into the *EIT Law* in 1999. The Government has retained and reinforced this concept through subsequent amendments to the *EIT Law*. As a result, double taxation agreements are becoming increasingly relevant in terms of taxation within Vietnam. In this regard, the MOF has issued a number of circulars that provide detailed guidelines on the application of double taxation agreements in Vietnam. *Circular No. 205/2013/TT-BTC* addressed the issue of beneficial ownership for eligibility of protection under double taxation agreements.

5. Other Forms of Doing Business in Vietnam

Apart from the forms of business provided under the *Investment Law 2014 and Enterprise Law 2014*, other means of establishing a commercial presence in Vietnam may include ROs, branch offices, contracted projects and franchising arrangements.

5.1 Representative Offices

A foreign party interested in having an institutional presence in Vietnam may establish an RO, which does not constitute an independent legal entity and is only allowed to engage in market research, “soft” marketing, liaison with the head office abroad in respect of trade and investment matters and overseeing the implementation of contracts in Vietnam. ROs are prohibited from engaging in direct profit-making activities and receiving any form of revenue.

5.2 Branch Offices

Branch offices are dependent units of foreign companies licensed to directly do business in Vietnam. Under the law, the types of businesses that may open branches are restricted.

Foreign companies that have done business in certain fields for more than five years may set up branches in Vietnam in accordance with Vietnam’s WTO Commitments and other treaties. Vietnam’s WTO Commitments allow foreign companies in some service areas to set up branches in Vietnam, subject to certain phasing (e.g., non-life insurance, securities, computer and related services, management consultant services, construction, and franchising).

5.3 Franchising

Provisions on franchising in Vietnam can be found under the *Commercial Law* and *Decree No. 35*, as amended by *Decree No. 120*,⁸ detailing the implementation of the *Commercial Law* specifically in relation to franchising activities. Additionally, *Circular No. 09*⁹ provides guidelines on registration procedures regarding franchising activities.

On January 15, 2018, the Government issued *Decree No. 08*¹⁰ repealing numerous business requirements under the administration of the Ministry of Industry and Trade (“**MOIT**”), with the aim to lift various administrative burdens that have long been imposed on local businesses, including franchising. Decree No. 08 has abolished some of the requirements for franchisors and franchisees under Decree No. 35.

Alternative laws on the subject of technology transfer and to an extent, intellectual property licenses, can also be used as a basis for establishing a franchise.

5.3.1 Condition for being a Franchisor

According to *Decree No. 35* (as amended by *Decree No. 08*), the business system that the Franchisor intends to franchise in Vietnam must have been in operation for at least one year.

5.3.2 Registration of Franchise Operation

⁸ Decree No. 35/2006/ND-CP, date 31 Mar. 2006, amending and supplementing administrative procedures provided in a number of decrees detailing the Commercial Law (“**Decree No. 35**”); amended by Decree No. 120/2011/ND-CP, (“**Decree No. 120**”).

⁹ Circular No. 09/2006/TT-BTM, dated 25 May 2006, guiding commercial franchising registration (“**Circular No. 09**”).

¹⁰ Decree No. 08/2018/ND-CP, date 15 January 2018 on amendments to certain decrees related to business conditions under state management function of the Ministry of Industry and Trade (“**Decree No. 08**”).



Parties to a franchise contract do not have to register their contract with the State authorities. Instead, foreign franchisors are required to register their franchise operation with the relevant State authorities before entering into franchise contracts. Registration of a franchise operation can be understood as a disclosure procedure by which franchisors submit their plan to enter into franchise contracts to the State authorities, as well as information on their background and franchise system.

According to *Decree No. 35* and *Circular No. 09*, application dossiers for the registration of franchise operations generally include the following:

- An application for the registration of a franchise operation, made according to the form guided by the MOIT;
- A written introduction of the franchise operation, made in accordance with the form stipulated by MOIT;
- Written certification of the following:
 - The legal status of the intended franchisor; and
 - Intellectual property right protection titles granted in Vietnam or a foreign country in the case of transferring registered intellectual property rights.

The franchise descriptions and the verification documents must be legalized in accordance with the law. If the documents referred to in the second and third items directly above are in a foreign language, these documents must be translated into Vietnamese and duly notarized and legalized.

The application dossier to register a franchise operation must be submitted to MOIT if such franchise operation is made from a foreign country into Vietnam, including cases where a franchise is being transferred from non-tariff zones, export-processing zones and other special customs zones into the territory of Vietnam. Franchising activities within Vietnam and franchising activities from Vietnam to foreign countries no longer need to be registered with the MOIT.

Decree No. 08 has repealed the registration requirement for franchisors under *Decree No. 35*. However, *Decree No. 08* does not extend to other regulations of *Decree No. 35*, which require a foreign franchisor to register its franchising activities with the MOIT before operating the franchise(s) in Vietnam. Thus, it is unclear, with the inception of *Decree 08*, whether franchising registration is still mandatory for foreign franchisors. Nevertheless, strictly speaking, because other regulations imposing the registration requirement on foreign franchisors under *Decree No. 35* have not been removed, it can be argued that foreign franchisors must still register their franchises in Vietnam.

Thus, foreign franchisors must register their planned franchise operation with the MOIT before entering into a franchise contract with a local franchisee.

Even though franchise contracts are not subject to registration procedures, their contents regarding intellectual property licensing and technology transfer are still subject to registration with the relevant State authorities, under intellectual property and technology transfer laws and regulations. The franchising contract must be drawn up in writing and in the Vietnamese language, except for cases where the franchise is from Vietnam and the franchisor desires to take it abroad, the parties to the contract may choose the language of the contract.

5.3.3 Disclosure Requirements

The franchisor must provide the potential franchisee with information on its franchise system and a franchising sample contract at least 15 working days before concluding a franchising contract, unless otherwise agreed by the parties.

Circular No. 09 provides a detailed list of information that must be disclosed concerning the franchise, as specified in the Franchise Disclosure Document ("**FDD**"). The prescribed form for the FDD consists of: (i) general information about the franchisor; (ii) goods/services and intellectual property rights licensed; (iii) financial obligations of the franchisee; (iv) initial investment by the franchisee; (v) obligations of the franchisor; (vi) description of market for the goods/services to be traded in the form of franchising; (vii) main contents of the franchise agreement; (viii) information about the franchising system; (ix) financial statement of the franchisor; and (x) awards, recognition to be received and organization(s) that need to participate.

5.3.4 Taxation of Franchise Fees

Taxation of franchise fees is not clearly provided for in the prevailing laws. However, tax on royalties gained from the licensing of intellectual property rights and technology transfers, which involve franchises, are provided for by law. A foreign franchisor is subject to foreign contractor withholding taxes in Vietnam.

By default, a local franchisee must withhold, declare and pay the applicable foreign contractor tax on the payments to a foreign franchisor. Vietnam is a signatory of bilateral tax treaties with certain countries, and these treaties provide a basis for reducing certain types of royalties.

5.4 Technology Transfer

The *Law on Technology Transfer* was passed by the National Assembly on 19 June 2017 and took effect on 1 July 2018. This law lays down rules governing the science and technology sector, individuals working in the sector, procedures for technology transfer, and measures to stimulate the transfer of technology.

On May 15, 2018, the Government issued *Decree No. 76*¹¹ detailing and guiding the *Law on Technology Transfer*.

5.4.1 Types of Technology Transfer

Technology transfer can be performed through the two following forms:

- To perform technology transfers independently; or
- To perform technology transfers as parts of projects or transactions as follows:
 - Investment projects;
 - Capital contributions in the form of technology;
 - Franchises;
 - Licenses or assignments of intellectual property rights; or
 - Sales or purchases of machinery attaching technology transfers.

The *Law on Technology Transfer* requires the transfer of industrial property rights in technology transfer contracts to follow the regulations on intellectual property. However, unregistered or expired intellectual property may also be the subject of technology transfer.

¹¹ Decree No. 76/2018/ND-CP dated May 15, 2018 detailing and guiding the implementation of Law on Technology Transfer ("**Decree No. 76**")



5.4.2 Registration Requirements

Pursuant to the *Law on Technology Transfer*, technology transfer agreements and technology transfer parts in investment projects, capital contribution by technology, franchise agreements, transfer of intellectual property rights and purchase or sale of machinery/equipment relating to technical know-how and technological know-how, technology plans or processes, engineering solutions, parameters, drawings or diagrams, formula, computer software and database, solutions for rationalization of production, and technology innovation, must be registered with the state management agencies of science and technology under the following circumstances:

- Technology transfer agreements from foreign countries to Vietnam;
- Technology transfer agreements from Vietnam to foreign countries; and
- Domestic technology transfer agreements using state capital or state budgets, except for those which have been granted a Certificate of Registration of the Results of Scientific or Technological Missions.

Technology transfer agreements which were signed and executed before the effective date of the *Law on Technology Transfer* (i.e., July 1, 2018) that are subject to the registration requirements as specified above, must be registered under the above procedures if the parties to the contract wish to renew such agreements after July 1, 2018.

If the registered technology transfer agreement is renewed, amended, or supplemented, such renewal, amendment, or supplement must be registered with the competent science and technology authority which originally granted the certificate of registration for such technology transfer agreement. The process in this case is similar to the registration process.

Technologies are classified into three types:

- Technologies in which transfers are encouraged, e.g., environment-friendly technologies, technologies preventing disasters, diseases, etc. (“**encouraged technologies**”);
- Technologies in which transfers are restricted, includes those involving risks to human health, the environment and national security (“**restricted technologies**”); and
- Technologies in which transfers are prohibited, e.g., technologies having negative impacts on national security, human health and environment, etc. (“**prohibited technologies**”).

Among the above, contracts for transfer of restricted technologies are subject to approval procedures. A list of restricted technologies has been published under *Decree No. 133*. It is noteworthy that the *Law on Technology Transfer* requires not only “approval procedures” but for parties to seek permission from State authorities before signing technology transfer contracts of restricted technologies. An organization and/or individual involved in the transfer of restricted technologies must apply for a technology transfer permit. The issuance of such technology transfer permit must comply with a licensing process in which the party involved must obtain (i) approval and (ii) a permit from the Ministry of Science and Technology (the “**MOST**”) to transfer restricted technologies.

Furthermore, an annual report on the execution of the technology transfer agreement must be submitted to the MOST by either the transferee (in case of transferring technology within the country or transferring technology from foreign countries to Vietnam) or the transferor (in case of transferring technology from Vietnam to foreign countries).

The transfer of prohibited technologies and the illegal transfer of restricted technologies are strictly forbidden under the *Law on Technology Transfer*.

5.4.3 Term of Contracts

The *Law on Technology Transfer* removes all time-limits for technology transfer transactions and allows parties to decide the term of contracts without any limit.

It also allows parties to decide the effective date of technology transfer contracts. If the parties do not negotiate the effective date, the technology transfer agreement will become effective as of the signing date, except for the following cases:

- The technology transfer agreement relating to restricted technologies is effective as of the issuance date of the technology transfer permit.
- The technology transfer agreements that are subject to the registration requirement become effective as of the issuance date of the Certificate of registration for technology transfer. If a technology transfer agreement is renewed, amended, or supplemented, the written agreement containing such renewal, amendment or supplement becomes effective as of the issuance date of the Certificate of Registration for such renewal, amendment or supplement.

5.4.4 Taxation

A foreign transferor is subject to foreign contractor withholding taxes on the amount of revenue generated from the technology transfer.

By default, a local transferee must withhold, declare and pay the applicable foreign contractor tax on payments to the foreign transferor.

There are, however, numerous tax policies designed to promote technology transfer. For example, EIT would be exempt from the income of enterprises derived from technology transfers under the list of encouraged technologies to organizations and individuals located in geographical areas of especially difficult socio-economic conditions. Additionally, revenue derived from technology transfers is exempt from VAT.¹²

¹² Decree No. 133/2008/ND-CP ("**Decree No. 133**") detailing and guiding the implementation of a number of articles of the law on technology transfer, issued by the Government on 31 December 2008, as amended by Decree No. 103/2011/ND-CP and Decree No. 120/2014/ND-CP;

Article 4.11 of Decree No. 218/2013/ND-CP ("**Decree No. 218**") stipulating in details and guiding the implementation of a number of articles of the Law on EIT, issued by the Government on 26 December 2013, as amended by Decree No. 91/2014/ND-CP dated 01 October 2014, Decree No. 12/2015/ND-CP dated 12 January 2015 and Decree No. 118/2015/ND-CP dated 12 November 2015; and

Article 4.21 of Circular No. 219/2013/TT-BTC ("**Circular No. 219**") guiding the implementation of Law on VAT and Decree No. 209/2013/ND-CP dated 18 December 2013 of the Government, issued by the Ministry of Finance on 31 December 2013, as amended by certain circulars.



6. Appendix 1

6.1 List of Conditional Investment Sectors

No.	INVESTMENT SECTOR
1.	Manufacture of seals
2.	Sale (and repair) of combat gear
3.	Sale of fireworks other than firecrackers
4.	Sale of camouflaged software and equipment used for audio and video recording and positioning;
5.	Paintball gun business
6.	Sale of military equipment and military goods for the use of the armed forces, military weapons, specialized military equipment and vehicles for the use of the army and police; special military components, accessories, materials and equipment and military engineering
7.	Pawning services
8.	Massage services
9.	Sale emergency signaling devices
10.	Debt collection services
11.	Security services
12.	Fire safety services
13.	Lawyer's practice
14.	Notary's practice
15.	Judicial assessment in the fields of finance, banking, construction, antiques, relics, copyrights
16.	Auctioneering services
17.	Commercial arbitration services
18.	Bailiff's practice
19.	Liquidation and safeguarding of assets of enterprises and cooperatives in the pending time of bankruptcy
20.	Accounting services
21.	Auditing services
22.	Tax agent services
23.	Customs brokerage services
24.	Sale of duty-free goods
25.	Bonded warehouse and container freight station business
26.	Premises for conducting customs procedures, customs gathering, inspection and supervision for rent.

27.	Securities trading
28.	Securities registration, depository, offsetting, and liquidation services by Vietnam Securities Depository/organizations trading in listed securities and other securities.
29.	Insurance business
30.	Reinsurance business
31.	Insurance brokerage
32.	Insurance agents
33.	Property assessment service
34.	Lottery business
35.	Casino video games for foreigners
36.	Debt trade services
37.	Ratings services
38.	Casino business
39.	Betting business
40.	Voluntary pension fund management services
41.	Oil and gas business
42.	Gas trading
43.	Manufacture and repair of liquefied petroleum gas (LPG) bottles
44.	Commercial assessment services
45.	Sale and destruction of industrial explosives
46.	Sale of explosive precursors
47.	Industrial explosives and explosive precursors –based business
48.	Blasting services
49.	Sale of chemicals other than prohibited chemicals stipulated in the International Convention on prohibition of development, production, stockpiling and use of chemical weapons on their destruction
50.	Alcohol business
51.	Sale of tobacco, cigarette, machinery and equipment for tobacco industries
52.	Sale of foods under the administration of the Ministry of Industry and Trade
53.	Commodity exchange operation
54.	Electricity generation, transmission, distribution, wholesale, retail, import, export and consultancy
55.	Rice export
56.	Temporary import and re-export of goods subjected to special excise duty
57.	Temporary import and export frozen foods
58.	Temporary import and re-export of goods on the List of used goods



59.	Franchising
60.	Logistics services
61.	Sale of minerals
62.	Sale of industrial precursors
63.	Commodity trading and business activities directly related to commodity trading by foreign investors and foreign-invested business entities
64.	Multi-level marketing business
65.	E-commerce business
66.	Petroleum business
67.	Energy audit
68.	Vocational training
69.	Assessment of the quality of vocational education
70.	Occupational skill assessment services
71.	Occupational safety inspection services
72.	Occupational safety and health training
73.	Employment agencies
74.	Overseas employment services
75.	Voluntary drug detoxification services
76.	Outsourcing
77.	Road transport services
78.	Automobile maintenance
79.	Manufacture, assembly and import of automobiles
80.	Motor vehicles inspection services
81.	Driver training services
82.	Traffic safety inspector training services
83.	Driving test services
84.	Traffic safety inspection services
85.	Waterway transport services
86.	Building, repair and renovation of watercraft
87.	Inland watercraft crewmen and operator training services
88.	Training, recruitment and supply of marine crews
89.	Maritime safety services
90.	Shipping services and shipping agencies
91.	Towage services
92.	Import and demolition of used ships

93.	Building, renovation and repair of ships
94.	Seaport operation business
95.	Air transport business
96.	Design, manufacture, maintenance and testing of aircrafts, their engines, propellers, avionics and equipment thereof in Vietnam
97.	Airport operation business
98.	Aviation service at airports
99.	Air navigation services
100.	Flight crew training services
101.	Rail transport business
102.	Rail infrastructure business
103.	Urban railway business
104.	Multimodal transport
105.	Transport of dangerous goods
106.	Pipeline transport business
107.	Real estate business
108.	Provision of training in real estate brokerage and property exchange operation
109.	Provision of training in apartment building operation.
110.	Construction management consulting services
111.	Construction surveying services
112.	(Construction) design and assessment services
113.	Construction supervision services
114.	Construction services
115.	Construction activities by foreign contractors
116.	Construction cost management services
117.	Construction quality assessment services
118.	Construction experiment services
119.	Apartment building operation services
120.	Cremation facility operation services
121.	Construction planning services
122.	Urban planning consulting services provided by foreign entities
123.	Sale of white asbestos of Serpentine group
124.	Postal services
125.	Telecommunications services
126.	Certification of digital signatures



127.	Publishing
128.	Printing services, except for printing of package
129.	Publication services
130.	Social networking services
131.	Online game business
132.	Paid radio and television services
133.	News website development services
134.	Processing, recycling, repair and renovation of used IT products of foreign owners which are on the List of used IT products banned from import
135.	Provision of information via telecommunications and internets
136.	".vn" domain name registration and maintenance services
137.	Cybersecurity products and services
138.	Civil cryptography services and products
139.	Sale of potable jamming devices
140.	Preschool education business
141.	Secondary school education business
142.	Higher education business
143.	Operation of foreign-invested education institutions, representative offices of foreign education institutions in Vietnam and branches of foreign-invested education institutions
144.	Continuing education business
145.	Operation of special schools
146.	Association in education with foreign countries
147.	Education quality assessment
148.	Overseas study consulting services
149.	Fishing
150.	Sale of aquatic products
151.	Sale of aquatic feed and animal feeds
152.	Animal feed and aquatic feed testing services
153.	Sale of biological preparations, microorganism, chemicals and environmental remediation agents used for aquaculture
154.	Building and renovation of fishing vessels
155.	Breeding, raising, artificial propagation of wild animals and plants according to CITES Appendix
156.	Breeding, raising, artificial propagation of wild, endangered and rare animals and plants according to CITES Appendix
157.	Breeding and raising of normal wild animals

158.	Export, import, re-export, transit and introduction of marine specimens stipulated in CITES Appendix
159.	Export, import and re-export of specimens bred, raised and artificially propagated according to CITES Appendix
160.	Sale of forest animals and plants restricted from use for commercial purposes
161.	Sale of plant protection products
162.	Processing of items subjected to undergo plant quarantine
163.	Pesticide testing services
164.	Plant protection services
165.	Sale of veterinary medicines, vaccines, biological preparations, microorganisms and chemicals used in veterinary medicine
166.	Veterinary technical services
167.	Animal testing and surgery
168.	Provision of vaccination, diagnosis, prescription, treatment and healthcare services for animals
169.	Veterinary medicine testing and assay (including veterinary medicines, aquatic veterinary medicines, biological preparations, microorganisms and chemicals used for veterinary medicines, aquatic veterinary medicines)
170.	Concentrated husbandry
171.	Slaughtering
172.	Sale of foods under the administration of the Ministry of Agriculture and Rural Development
173.	Animals and animal product quarantine services
174.	Sale of fertilizers
175.	Fertilizer testing services
176.	Sale of plant varieties and animal breeds
177.	Sale of aquatic breeds
178.	Testing of plant varieties and animal breeds
179.	Aquatic breed testing services
180.	Testing and assay of biological preparations, microorganism, chemicals and environmental remediation agents used for aquaculture
181.	Sale of genetically modified products
182.	Medical treatment and examination
183.	HIV testing services
184.	Tissue banking services
185.	Reproduction assistance, sperm and embryo cryopreservation
186.	Testing of microorganisms causing infectious diseases



187.	Vaccination
188.	Opioid substitution therapy
189.	Plastic surgery
190.	Surrogacy service
191.	Pharmaceutical business
192.	Cosmetics production
193.	Sale of chemicals, pesticides, germicides for the use in medical appliances
194.	Sale of foods under the administration of the Ministry of Health
195.	Sale of medical equipment
196.	Medical equipment classification services
197.	Medical equipment testing services
198.	Appraisal of intellectual property (including appraisal of the copyrights and others relevant, appraisal of industrial properties and plant breeder's rights)
199.	Radiological services
200.	Assistance in application of atomic energy
201.	Assessment of conformity
202.	Testing, calibration and inspection of measuring instruments and measurement standards
203.	Manufacture of biker helmets
204.	Technology assessment and evaluation services
205.	Intellectual property presentation services
206.	Film production and distribution
207.	Antique appraisal services
208.	Development of project planning, construction, project supervision, maintenance, renovation and restoration of relics
209.	Karaoke and nightclub business
210.	Travel services
211.	Sport business and professional sport clubs
212.	Business involving art and fashion shows, model contests and beauty pageants
213.	Sale of art performance video and audio recording
214.	Accommodation services
215.	Advertising
216.	Trading in national relics, antiques and treasures
217.	Export of relics and antiques other than those under the ownerships of the Government, political organizations and political-social organizations; import of cultural products under the administration of the Ministry of Culture, Sports and Tourism
218.	Museum services

219.	Video game business (other than casino video games for foreigners and online casino video games)
220.	Land assessment and survey consulting services
221.	Land use planning services
222.	Information technology infrastructure and land information software system development services
223.	Land database development services
224.	Land pricing services
225.	Geodesic and cartographic services
226.	Meteorological and hydrological forecasting services
227.	Groundwater drilling and exploration services
228.	Extraction and use of water resources, discharge of wastewater into water sources
229.	Basic survey and consulting services for preparation of water resource planning, schemes and reports
230.	Mineral exploration
231.	Mineral extraction
232.	Transport and treatment of hazardous wastes
233.	Import of scraps
234.	Environmental monitoring services
235.	Sale of biological preparations from waste treatment
236.	Commercial bank business operations
237.	Non-credit institution business operations
238.	Business operations of cooperatives, people's credit funds and microfinance institutions
239.	Payment intermediary services
240.	Credit information services
241.	Foreign exchange activities by non-credit institutions
242.	Gold trading
243.	Money printing and minting



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