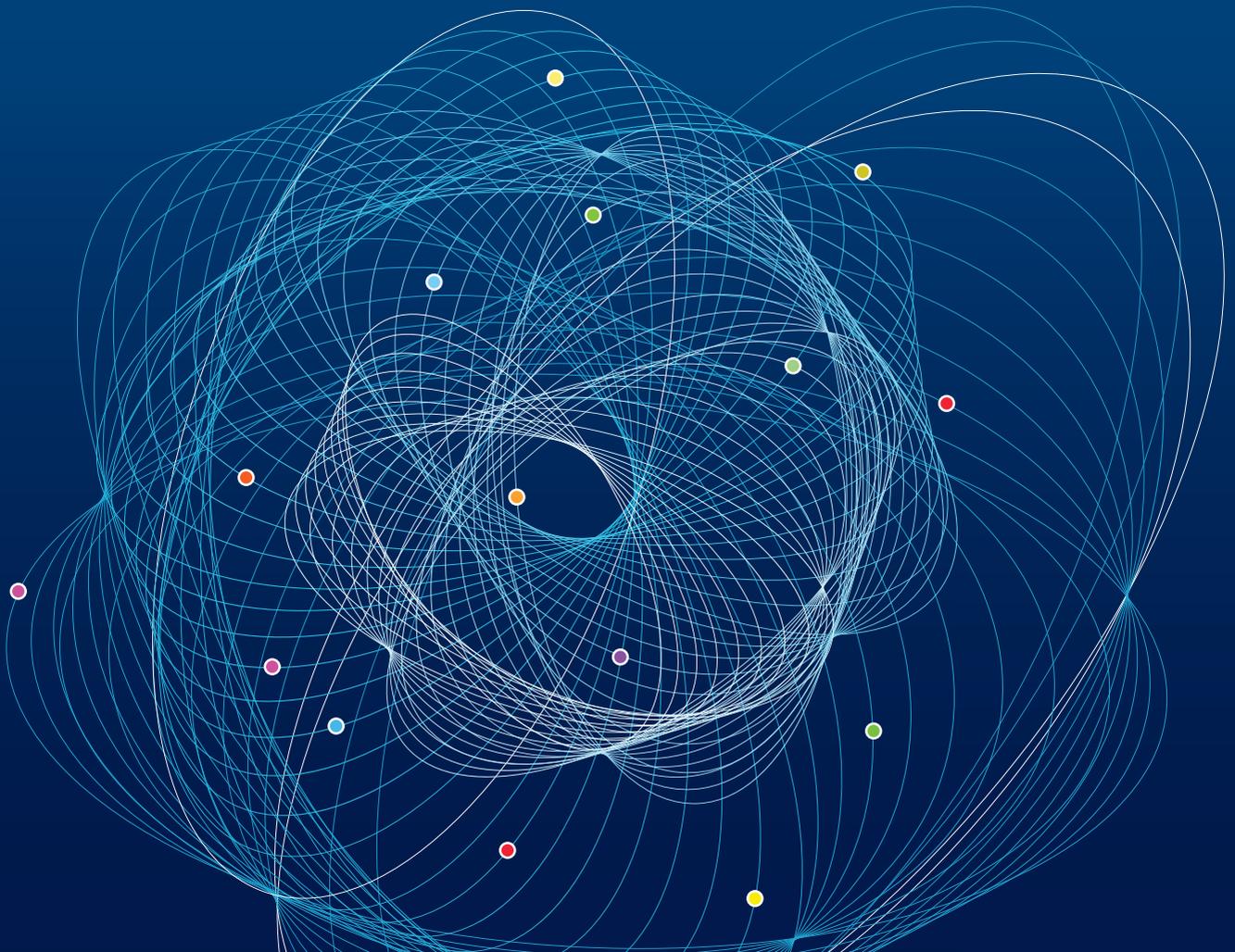
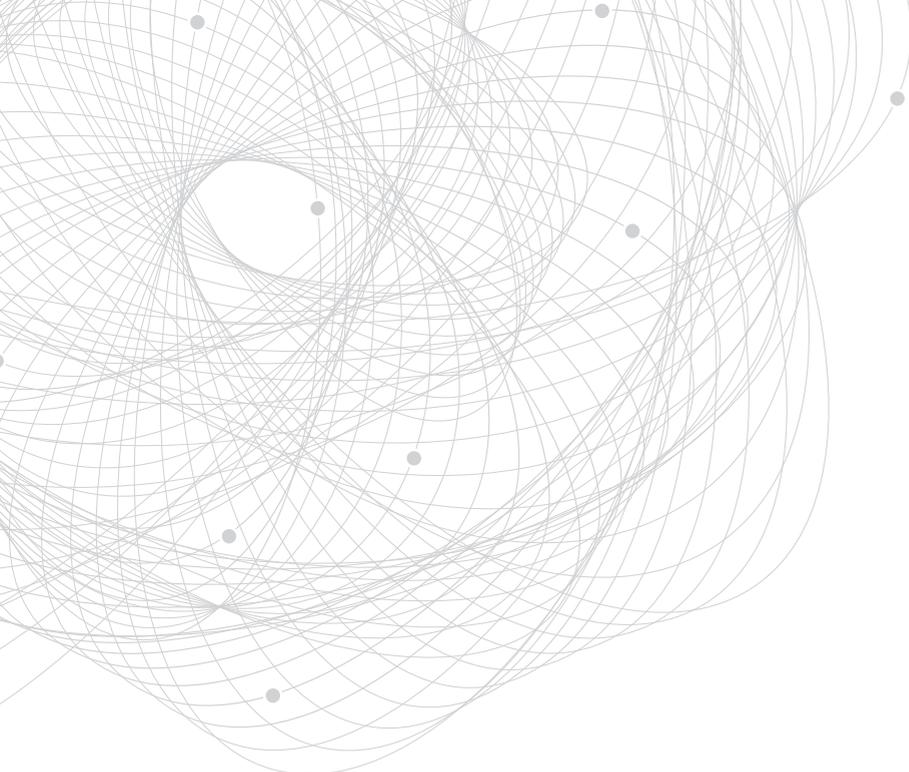


THE CURRENT OF BUSINESS LAWS IN 2020

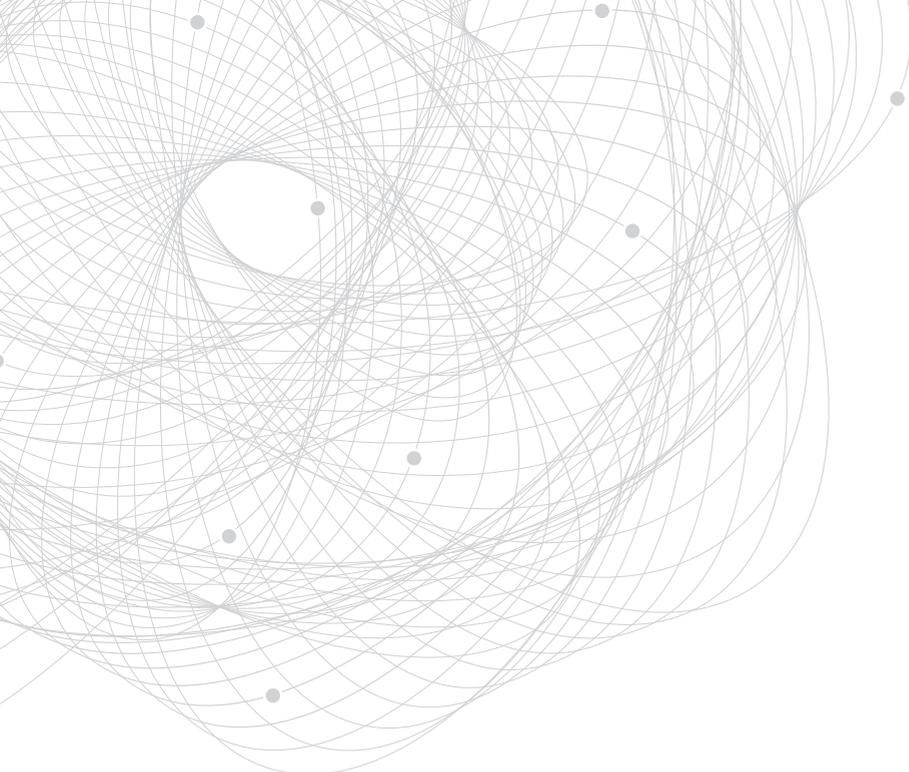




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THE CURRENT OF BUSINESS LAWS IN 2020





INTRODUCTION

The Current of Business Laws series is an annual activity of the Vietnam Chamber of Commerce and Industry (VCCI), which aims to periodically record the picture of Vietnam's business laws every year.

Based on the comments and reflections of enterprises, associations and studies by the research team, the Report will review some notable laws in 2020. The selection of regulations for analysis and comments in this Report is based on a number of criteria such as the significant influence on enterprises in Vietnam, special problem-solving approach or typical drafting and promulgating process.

In addition, the Report also selects important legal issues for analysis and evaluation that directly affect the business and investment environment. This year's Report focuses on ***Concerns in regulations on market entry conditions*** and ***The legal framework for digital economy***.

The Report tries to provide enterprises' perspective on legal issues, thereby conveying the expectations and aspiration of business community to policy makers.

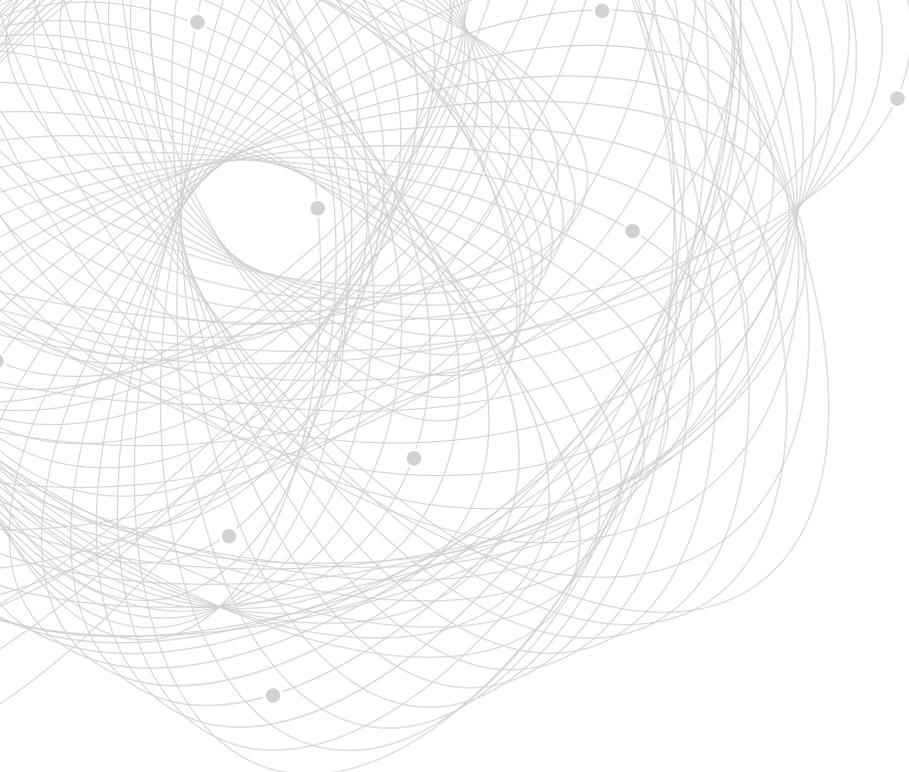




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LIST OF ABBREVIATIONS

ASEAN	Association of Southeast Asian Nations
GDP	Gross domestic product
IT	Information and technology
LND	Legal normative documents
PC	People's Committee
VCCI	Vietnam Chamber of Commerce and Industry



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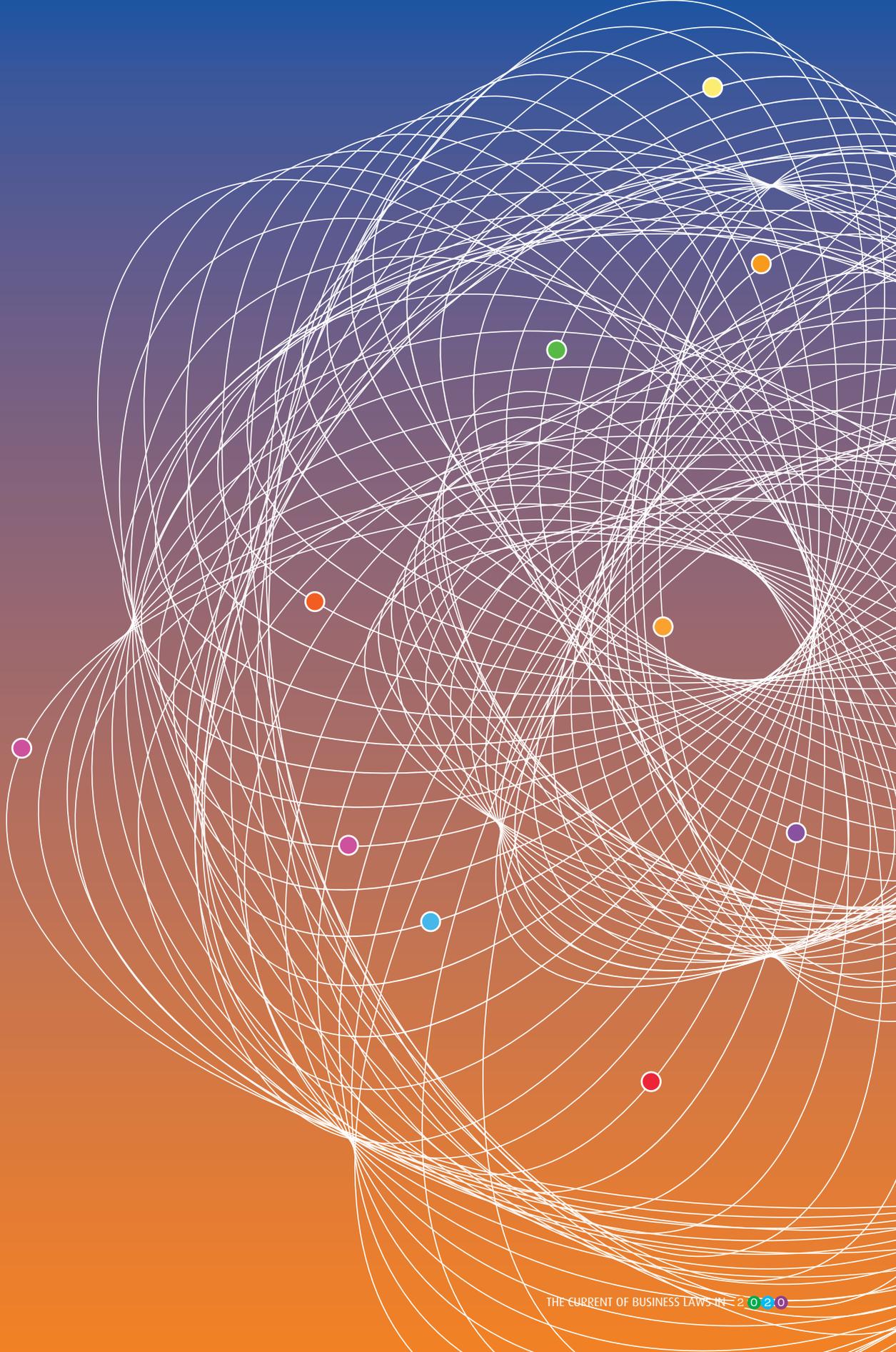
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LEGAL REVIEW

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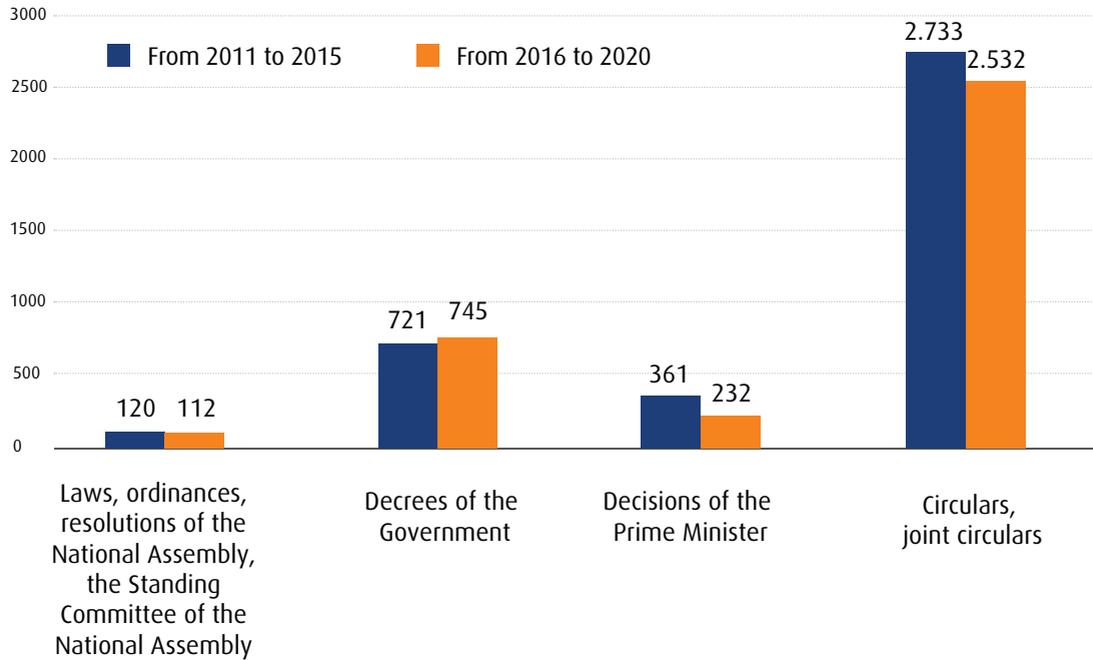
There is a decrease in the number of legal normative documents (LND) issued in 2020 compared to the average volume of previous years. According to the Database of Legal normative documents at the Web Portal of the Government, in 2020, central state agencies had issued 546 LND, among which 17 laws by the National Assembly, 158 decrees by the Government, 39 decisions by the Prime Minister, 310 circulars by Ministers and a number of other documents. Compared to previous years, there is no significant change in the number of laws, decrees and decisions issued by the Prime Minister, but a sharp decrease in the number of circulars (there were 467 circulars in 2019, 643 circulars in 2018 and 556 circulars in 2017).

15 out of 17 Ministries regularly issuing enterprises related documents see decreased number of circulars compared to 2019, only two of them (Ministry of Information & Communications and Ministry of Education & Training) increase the number of issued circulars. Regarding the Ministry of Education and Training, most of the circulars are to implement the Law on Education and the Law on Higher Education issued by the National Assembly in previous years. As for the Ministry of Information and Communications, not only more circulars being issue, but the Ministry also conducted numerous reviews of legal documents in their fields of management for amendments in the future.

There can be several reasons for the decline in the number of documents, especially the circulars. First of all, it is worth mentioning that 2020 is final year of the tenure, many Ministries pay more attention on organizational structure issue than formulation of legal documents. Second reason may relate to the impacts of Covid-19 pandemic resulting in stagnated formulation of many legal documents. Third, it may be partly due to the Government's direction in reducing legal documents as stated in Resolution No. 68/NQ-CP of the Government dated May 12, 2020: *"in the period from 2020 to 2025 ... minimize the number of current documents providing business regulations under the jurisdiction of Ministers, Heads of ministerial-level agencies, Prime Minister and the Government"*. Fourth, many agencies have strictly implemented regulation on restricting the authority to issue documents of Ministers such as no promulgation of new circulars or regulations on business and investment conditions.

During the 5-year period from 2016 to 2020, central agencies had issued a total of 71 laws, 745 decrees, 232 Prime Minister's decisions, 2,422 circulars and many other documents. In particular, the number of laws and decrees had not changed considerably compared to the previous 5-year period, but the number of Prime Minister's decisions and circulars see a decrease of 129 and 201 documents respectively reflecting the policy of reducing the number of guiding documents or decisions and circulars. Promulgation of legal normative regulations is concentrated at the National Assembly and the Government.

Figure 1: The number of LND issued by central agencies



IMPORTANT LAWS DISCUSSED AND PROMULGATED BY THE NATIONAL ASSEMBLY

The Law on Enterprises, Law on Investment and Law on Public-Private Partnership Investment passed by the National Assembly in 2020 will come into effect as of January 01, 2021 that are important legal documents with considerable impact on the business community expecting to create a complete and favorable legal corridor for our country's business and investment environment.

The Law on Investment 2020 solves most of the conflicts and overlaps in investment procedures between this Law and other specialized laws - this is a pressing issue reflected by the business community in 2019. Besides, provisions related to investment incentives in this Law were also amended and supplemented in order to ensure consistency between legal documents regulating the same issue. Regarding conditional business investment, the Law on Investment 2020 continues to remove some industries and trades from conditional business lines which even though fails the expectation, but the shortened list of conditional business lines (from 243 to 227) demonstrates the determination and efforts of the authorities in promoting "freedom of business". On the other hand, the Law on Investment 2020 has added "debt collection service business" to the list of prohibited industries and trades that is an absolute restriction to the business right of enterprises. While there is no convincing explanation for this prohibition, policy concerns will be raised in the business community.

In addition to the reforms in procedures related to business registration, new regulations on state-owned enterprises (no need to notify seal sample; possible use of "digital" seal instead of "traditional" seal; mechanism for online business registration with electronic dossier), the Law on Enterprises 2020 continues to amend regulations related to corporate governance and improvement of the protection level to investors and shareholders in line with good and universal international standards and practices. However, a "regrettable" point of the Law on Enterprises is the failure to regulate the household businesses - an important business subject in the economy with a workforce of nearly 8,000 workers and a revenue of 2.2 quadrillions dong, accounting for about 30% of GDP¹, whose position and role are not properly valued as other business subjects.

The Law on Public-Private Partnership (PPP) Investment is a new law that upgrades the regulation on public-private partnership investment from decree to law. This Law segregates five eligible sectors for PPP investment in order to concentrate resources (transportation; power grids and power plants (except for hydro-power plants and State monopolies as prescribed by the Electricity Law); irrigation, clean water supply, water drainage, sewerage and waste treatment; health care and education; and information technology infrastructure). It also regulates the decision making procedure for investment policies; the selection of investors; sharing mechanism of revenue increase and decrease (sharing mechanism with a fixed rate of 50% -50% for both parties; conditions for sharing revenue decrease); relation between the State and investors; cancellation of BT project implementation in the coming time. This law is expected to create a more effective and stable legal corridor to help investors avoid risks in case of policy changes, and at the same time increase the attractiveness of investment projects as well as ensure successful project implementation.

¹ <https://baodautu.vn/dua-ho-kinh-doanh-vao-luat-doanh-nghiep-van-trai-chieu-quan-diem-d122590.html>

The above laws were passed in June 2020 and will come into effect on January 01, 2021. Thus, the Government will have nearly 6 months to issue guiding decrees, most of which are promulgated in a simplified procedure, and even though it is a compulsory requirement to collect comments from affected subjects, the drafting agencies consulted with representatives of the business community in a very short period. This legal document making procedure will reduce the opportunity to access and give feedback of affected subjects, especially the business community resulting in concerns raised about quality of the guiding decrees.

A notable imprint in the legislation activity is that in the November 2020 session, the National Assembly has not approved the proposal of law project namely the Law on Grassroot-level security protection force and disapproved the separation of two law projects namely the Law on Road traffic project and Law on Ensuring Road traffic order and safety. The separate decision of National Assembly on the necessity of a specific law has increasingly demonstrated its role in major policy decision and the quality of regulatory document development.

The Law on Environmental protection issued at the November session is also an important legal document for enterprises. This law seems to reflect more clearly the viewpoint of not trading the environment for economic benefits. Administrative procedures and environmental protection obligations for enterprises are regulated in a more stringent direction. For example, instead of having only one environmental impact assessment procedure, in the near future, a new investment project must carry out 3 procedures including preliminary environmental impact assessment, environmental impact assessment and environmental permits. This enables more thorough consideration of environmental aspects in the investment projects, but will also increase the risks and costs of compliance for enterprises.

For many years, the National Assembly has curtailed the promulgation of “framework” laws, “pipe” laws and laws pertaining to decrees and circulars for implementation. However, the Law on Environmental Protection is an example of unfully resolved issues of “framework” laws and “pipe” laws. Many of its provisions bear nature of framework policy with general regulations that need guiding documents. For example, the provision on obligations of manufacturers and importers to collect, treat and recycle packaging and discarded products is a policy of big concern by many enterprises, but the provisions in the Law remain general with their impacts being unknown until guiding decrees are promulgated.

Immense shortcoming is seen in this way of law-making. When there is no guiding documents, the drafting agency cannot assess impacts of the new policy while enterprises do not know if they are subject to the impacts so as to raise their opinions. Even if yes, they fail to contribute their ideas as the drafting agency always refuses to listen and responds that the guiding documents will provide elaboration. However, according to the Law on Promulgation of Legal Normative Documents, there is no need to assess the impact while drafting decrees. In many cases, in order to finalize before effective date of the Law, the decrees are made in a hasty manner with superficial consultation process. As a result, during the entire process of developing laws and decrees, the impact assessment is not fully implemented with limited opportunity for interested stakeholders’ contribution.

POLICIES TO SUPPORT BUSINESSES AFFECTED BY THE COVID-19 EPIDEMIC – IN A TIMELY BUT INCONSISTENT MANNER

In 2020, the Vietnamese economy and the world are "overshadowed" by the Covid-19 epidemic. Many surveys conducted by State agencies and private organizations show the serious impacts of the epidemic. This disease affects almost every sector in the economy. In addition to continue to implementing institutional reforms from the previous year, this year, one of the outstanding policies of the State are regulations on supporting businesses to overcome the crisis caused by the Covid-19.

Right from the beginning of the year, the Government has drafted and issued many supporting legal documents for businesses such as: Decree 41/2020/ND-CP on extension of tax payment deadline and land rental, which identifies entities that are businesses damaged by epidemics in certain sectors or fields; extended taxes (value added tax, corporate income tax, land rental) in which it is quite clear regarding the extension period; series of Circulars on reduced charges and fees relating to the business activities of enterprises in many fields (mostly fees of public services provided by the Governmental agencies).

The rapid promulgation of policies by the Government and Ministries and sectors to support businesses shows the rapid response of the State when recognizing the impacts of the Covid-19 epidemic and providing substantial solutions to meet the needs of the businesses. These policies have contributed to solving significant difficulties for businesses in industries and occupations vulnerable to the Covid - 19 epidemic and also demonstrated the role of the State to accompany with enterprises to overcome the crisis.

However, the above policies also lead to some concerns, for example:

- *Regarding the regulations on extension of time limit for paying tax and land rental:* It is very important to determine exactly those who will get such extension to avoid spreading support policy and ensure efficiency of the regulations. Decree 41/2020/ND-CP has identified beneficiaries of this policy based on sectors - predicted to be damaged by the disease.

Design of these regulations is reasonable, but they *only* identify the subjects benefiting from extension based on this criterion will *miss* those who suffer directly as businesses affected by the decision quarantine, customs release, force the shutdown of agencies (enterprises with headquarters, locations, production and business establishments located in quarantine areas under decisions of State agencies; enterprises with 20% or more of employees are subject to compulsory quarantine under a decision of a competent State authority).

- › *Regarding Circulars on fees and charges:* from the beginning of the year until now, a number of Circulars on fees and charges have been issued, in which the rates of fees and charges reduced for public services provided by the State, applied from May 5th, 2020 to December 31st, 2020. This move will contribute to reducing the financial burden on businesses and promote the market entry of business entities.

However, when reviewing the reduced fees and charges, it seems that the discount policy has many inconsistencies.

Example 1

The same activity is issuance of business license, but the fee for the grant of business license for international travel services, license for domestic travel business; permits for establishment and operation of credit institutions, non-bank credit institutions; licenses, certificates operating in the securities sector are *reduced by 50% compared with the current fees*. But the fee for the certificate of eligibility for technical inspection of occupational safety; The certificate of eligibility for training of occupational safety and sanitation is *only 30% lower than the current fees*. It is a government agency's assessment of business conditions for issuing a business license, but the rate of fee reductions in different areas is quite different, leading to concerns for beneficiary businesses.

Example 2

Regarding activities of granting business license in the field of credit, but the license fee for the establishment and operation of a credit institution or non-bank credit institution is *reduced by 50% compared to current fees*, while licensing fees for the establishment and operation of microfinance institutions and people's credit funds are *not reduced*. The fee for the license to provide intermediary payment services to organizations other than banks is not reduced. It is not clear why these entities' licensing fees are not reduced.

Example 3

The same is the issuance of a practicing certificate, but the fee for the new issuance, renewal, re-issuance of the securities practicing certificate to the individual practicing securities at a securities company or management company securities investment funds and securities investment companies are not reduced while the fee for granting construction practice certificates; issuance fee of tour guide cards is reduced 50% compared to the current rate.

It can be seen that the State has made special efforts to take measures to support enterprises to overcome difficulties caused by Covid-19 diseases. However, the reduction in charges and fees are not synchronized, leading to many wondering concerns.

REGULATIONS ON STARTING A BUSINESS - THE BRIGHT SPOT OF POLICY

In 2020, the Government drafted and issued documents to promote business start-up. This is considered one of the bright spots of policy-making activities this year.

According to the Doing Business 2020 report of the World Bank, Vietnam is ranked the 115th economy among 190 economies, ranked the 6th in ASEAN with 08 procedures and duration of 16 days. Although in the past time, the State has issued many reform policies to improve the Business Start-up Index, but the ranking of our country has not been improved. The reason is that the regulations on starting a business are still unreasonable, businesses have to implement many procedures, there is overlap in information between the procedures, there is no connection or linkage. Decree No. 122/2020/ND-CP of the Government was issued to build a process of linking enterprise registration procedures, labor declaration, issuing social insurance unit codes, chemical procedures. application, documents, integrating three processes: social insurance registration, labor reporting and registration to use invoices into the business establishment process. According to new regulations, businesses will only have to prepare 01 sets of documents, 01 declaration form, to be implemented in 01 office and get 01 uniformed result, shortening the maximum time to market in the enterprise (within 03 days - on time for the issuance of the Certificate of Business registration as prescribed in the Law on Enterprises), the request to buy invoices is still made at the tax authority within 02 days. Thus, the provisions of Decree 122/2020/ ND-CP have significantly shortened the period taken for the procedure starting a business, contributing to streamlining administrative procedures, facilitating the business owner when entering the market.

Decree 22/2020/ ND-CP amending Decree 139/2016/ND-CP in the direction of supplementing subjects exempt from license fees including newly established businesses and household businesses. Previously, any business owner entering the market must pay fees for licenses and this is the level of charge paid annually, according to the provisions of Decree 22/2020/ND-CP, in the first year, organizations, individuals, groups of individuals and households just starting to do business or just setting up production and business establishments will not have to pay license fees. The exemption from paying license fees in the first year of business will facilitate business owners when entering the market.

The enactment of the above Decrees has demonstrated the remarkable efforts of State management agencies in improving the business environment and promoting start-ups. This approach is expected to make an important contribution to promoting Vietnam's growth in the World Bank Doing Business in the coming time.

"OLD THINKING" STILL FLICKERS IN POLICY-MAKING ACTIVITIES

Since "freedom of business" was emphasized and expressed in the direction of increasing expansion in the Constitution (1992, 2013) to important legal documents, the foundation of business activities such as the Enterprise Law (2005, 2014, 2020), Investment Law (2005, 2014, 2020), the management thinking of business of policy makers have undergone strong changes.

In recent years, the Government has made great efforts in promoting the business environment, especially in relation to institutional reform. The review rounds to cut, simplify business conditions, and administrative procedures have been conducted consecutively. Regulations related to the rights and obligations of enterprises are strictly controlled when promulgated, management policies on business are also more open, expressing the viewpoint on "freedom of business" of businesses, and citizens.

Basically, the legal documents drafted and/ or promulgated on business this year have shown the right direction in the spirit of reform, promoting investment and business environment that the Government has set out and chased for the last period. But this doesn't mean that the current policies are perfect. In 2020, a number of documents that have been drafted/ issued still include slightly "old thinking" - imposing overly strict management measures; they have not created a legal corridor for private enterprises to operate or the administrative procedures are not transparent.

INCREASED EXCESS MANAGEMENT MEASURES

According to the current law, the management mechanism for providing performing arts services, organizing beauty and model competitions is to grant license for each activity. This mechanism may be reasonable, because the subject to be managed here is each specific art activity/ event (performing arts program, beauty contest, model, fashion) - consider if the contents of this activity violate moral norms, traditions, habits and customs or not?

At the end of 2019 and in the early 2020, a draft Decree on performing arts to replace Decree 79/2012/ ND-CP and Decree 15/2016/ ND-CP was drafted, including changes to the management mechanism for this business. Specifically, besides *the management mechanism under the act as currently*, the draft *added the management mechanism under the business entity* by adding provisions on the conditions for business entities providing this service. This management measure is overly strict.

As mentioned above, the subjects that need to be managed in this business are art activities/ events. And these objects are controlled by the license granted for each activity/ event. Thus, the risk of affecting public interests is completely controlled. Therefore, setting out conditions for the subjects that can provide the service has no service to management objectives (because businesses may have met all the conditions required to get permit for operation but nothing ensures that a specific artistic activity that this business organizes to meet the requirements) and this is an unreasonable management measure, this will create a significant barrier for entities that want to do business in this field.

As well as art performances, fashion shows, modeling competition, the field of valuation and expected additional business conditions of business valuation and additional obligations of appraiser's occupations in the Draft Decree amending and supplementing Decree 89/2013/ ND-CP drafted at the end of 2019 and in 2020.

The draft Decree has additional conditions for the representative at law, the director or general director of the enterprise valuation (required number of years of experience and the minimum number of Certificate and Report price appraisal results signed) for the purpose of "ensuring the quality of services provided", "limiting unfair competition in prices between price appraisal enterprises" and the drafting agency said that this provision is the legal guarantee of "in accordance with the Law on Investment 2014 when determining price appraisal is a conditional business investment line".

Excluding the reasonableness and ability to meet the management goal or not, the addition of conditions for the legal representative, director or general director of the valuation enterprise is *not appropriate*. Law on Price regarding business conditions of business valuation. Valuation is a conditional business line as defined in the Law on Investment - it is appropriate to issue business conditions for this industry, but the business conditions shown in the Decree must be consistent with the Price Law. Therefore, the legality of this regulation needs to be reviewed.

Legality can be overcome by revising the Price Law, but is the problem reasonable when raising the conditions of the legal representative of the valuation enterprise? And does raising this condition achieve the above goals? According to the law on price, the person responsible for the quality of the appraisal report, the appraisal certificate is the practicing price appraiser² thus imposing conditions on the representative. According to the law of the business is not convincing enough to confirm the quality assurance of price appraisal service. As for concerns about unfair competition among price appraisal enterprises, the condition of the legal representatives of these enterprises is difficult to solve the problem and is an inappropriate management measure.

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The road transport sector is also tending to tighten management measures for transport business. After more than 10 years of implementation, the Draft Law on Road Traffic is being revised to replace the 2008 Law which revises the business conditions for passenger transportation. The bill removes some unreasonable business conditions of the current law, but adds a fairly important condition that is to drive transport business in addition to having a driver's license (classes corresponding to each type of transport vehicle) the driver must have a "transport business driver license".

² Point c, Clause 2, Article 37 of the Price Law

This is a new type of license and carries the risk of increasing unnecessary and duplicate application-giving processes on management objectives. This type of license is required. This is a new type of license and there is the risk of increasing the application process for unnecessary and duplication of regulatory objectives. The requirement to have this type of license is speculated to ensure that the drivers of the transport business have enough skills to drive safely, to ensure traffic safety, and to the lives of customers and people in traffic other as well as cargo safety. However, the fact that a driver has a "driving license" means that the State has checked and confirmed that he or she is capable of driving safely for the respective vehicle. Therefore, requiring drivers to have both a "driver's license" and a "driver's license in the transport business" puts a heavy burden on the driver's procedures, costs and time when having to go through two training sessions, and two licensing procedures for a similar goal.

In summary, the trend of reform on trading conditions and promote business environment favorable, these policies are being drafted or enacted seems to go against the objectives that the Government is following. Although it is known that the regulations aim to minimize the risks that may affect the business environment, the public benefits of the business in the above area, but the management measures towards this tightening does not seem to properly solve the problem, but also creates a burden on the businesses.

MARKET INTERVENTION NATURE

The use of administrative measures to directly intervene in problems which have been adjusted by the market has been quite limited during the renovation period. The State has created a business environment conducive to business operations and only applied management measures necessary if business enterprises in the profession in which business activity could lead to risks for profit public interest.

In 2020, management measures of market intervention nature are still "faded" in a number of draft documents.

Regarding the tariff declaration for a number of types of passenger transport

The procedures for declaration of passenger transport charges by car on fixed routes, buses and taxis are being designed in the Draft Circular amending Joint Circular 152/2014/TTLT-BTC-BGTVT towards: At least 05 working days in advance when following the declared freight rate, the transport enterprise or cooperative must send a written declaration of freight rates to the Department of Transport where the enterprise is headquartered. independent accounting branch. The Department of Transport will review the price declaration document and request the enterprise to explain if the contents in the price declaration document are not clear about the reason for the price adjustment. The enterprise will not be allowed to apply the registration price when the explanation of the reason for the rate adjustment is not relevant, not related to the increase or decrease of the rate.

The above order and procedures show that the competent State agency will consider the factors that make up the cost of passenger transport by car, bus, taxi and decide to see the increase. or whether the price reduction is reasonable and does not allow enterprises to implement the price proposed by the business if it is not found reasonable. This is considered as a management measure that directly interferes with the enterprise's self-valuation right and is not consistent with the provisions of the law on prices. According to the Law on Price, passenger transportation services by car on fixed

routes, buses and taxis are not in the group of services that perform price stabilization, the State determines - types of services of home agencies. The country has the authority to examine the price formulation in certain cases.

On the other hand, the transport business following fixed journeys and taxis has a competitive market, so putting this group in the field of having to carry out procedures to serve price management seems unreasonable.

Required minimum number of Deeds and Valuation Reports must be signed during the year

In addition to supplement conditions for the legal representative, the Draft Decree on Valuation (amended) also requires a minimum number of Deeds and Report on appraisal results in the year that the appraisal price staff must sign. If this quantity is not reached, they will not be registered to practice in the following year. The application of a minimum number of Deeds and Valuation Report signed during the year of the price appraiser is considered an administrative measure directly intervening in the market. Because, businesses cannot know how many customers they have in a year and how many services they provide, depending on the market. This regulation will result in the result that many businesses will have to suspend operations for not meeting the conditions because the price appraisers do not sign enough Certificates and Valuation Reports according to regulations and photos. seriously affect the competitive market of this sector.

THE STATE REMAINS "CLOSED" TO MECHANISMS THAT SHOULD HAVE BEEN "OPEN"

The transfer of subjects performing service provision activities from the State to the private sector is one of the strong marks of the post-reform (Doi Moi) period, demonstrating the managers' thinking towards the market economy. Since 2000 (when the Ordinance on Product and Goods Quality took effect), 2007 (the birth of the Law on Standards and Technical Regulations) up to now, the conformity assessment services have been gradually transferred to businesses instead of the State monopoly before the period above.

However, by 2020, testing services of telecommunications equipment, radio stations - as stipulated in Circular 07/2020/TT-BTTTT, still done by "public units of engineering services belonging to a state management agency, fully satisfying the conditions for providing inspection services as prescribed by law, and assigned by the Ministry of Information and Communications to perform the inspection".

Testing of telecommunication equipment and radio stations means "testing and certifying telecommunications equipment and radio stations in accordance with national technical regulations"³, which is a certification activity. As stipulated in Decree 105/2016/ND-CP, the "testing" is considered as business conditions permit, enterprises meet business conditions and licensees, which are specified can provide this service. Therefore, the only limitation of State management agencies to carry out this activity does not seem to be consistent with the policies on subjects providing these types of services.

³ Clause 3 Article 2 of Circular 07/2020/TT-BTTTT

Because the service provider is a public agency, the process for appraisal and inspection certificate is designed as a form of administrative procedure, while by nature, inspection is a form of the service provided by the enterprise will be performed on a contractual basis. The process of requesting an inspection and the deadline for issuing an inspection certificate is based solely on the agreement of the parties. This mechanism will be faster and more flexible than administrative procedures.

In the trend of shifting from the state sector to the private activities regarding service provider certificate of conformity, the inspection of telecommunications equipment, radio stations still not be open for private, which seems to be really hard to understand.

SOME OBSTACLES OF THE REGULATIONS IN THE ISSUED DOCUMENTS

At the period of drafting a legal document, the factors of reasonableness, feasibility and transparency are always considered and assessed. Documents that show the "breath of life" through listening and criticizing from the affected objects will partly meet the above criteria and will be favorable when deployed in practice. In recent years, VCCI has received a number of recommendations from businesses about difficulties and problems when implementing some effective documents. These problems increase the burden of administrative procedures and hinder investment, production and business activities of enterprises.

INCREASING ADMINISTRATIVE PROCEDURES FROM THE LACK OF TRANSPARENCY AND RATIONALITY IN THE EDUCATION SECTOR

Decree 135/2018/ND-CP is considered to have many progress and reform points compared to Decree 46/2017/ND-CP because it has reduced and simplified many business conditions in the field of education. Therefore, investment activities in this field are also more favorable.

But in two years of application of the past, some provisions of Decree 135 and Decree 46 and Circular 21/2018/TT-BGDĐT guide two decrees arose inadequate and needed to be reviewed to amend, specifically:

Under the provisions of these two Decrees, an enterprise can set up a foreign language and informatics center and must apply for a license to operate at a competent state agency. The name of the foreign language and informatics center "must not coincide with the proper name of the center previously established" (Clause 2, Article 4 of Circular 21/2018/TT-BGDĐT). The above documents do not stipulate whether an enterprise can open many/expand foreign language centers in the same locality or not.

Therefore, when implementing, businesses encounter problems when understanding and applying in localities are different. There are localities that do not allow the expansion of a foreign language and informatics center, which means that the enterprise has already applied for permission to open a foreign language center, and now it wants to open another language center named this language center in other areas in the same county/ city/ province are not allowed. In case the establishment is allowed, the enterprise must apply for a license to set up a new language center with a new name. This has a great influence on the business operations of enterprises when they want to exploit their existing brands.

Or the introduction of the concepts but lack of regulations to explain also leads to difficulties in applying Circular 21/2018/TT-BGDĐT stipulates that teachers of informatics language centers "are the ones in charge of teaching, guiding practice, including organic teachers, teacher contract teachers are Vietnamese, teachers who are native speakers (for each specific foreign language), foreigners" (clause 1, Article 18), conditions of teachers teaching at foreign language and computer centers" Teachers are native speakers foreign language teaching (for each specific foreign language): Have a

college degree or higher and an *appropriate* foreign language training certificate"; "Foreign teachers are qualified to teach foreign languages Have a foreign language college degree or higher and an *appropriate* foreign language training certificate" or "Have a college degree or higher, a foreign language ability certificate from level 5 or higher according to the 6-level language proficiency framework used for Vietnam or equivalent and *appropriate* foreign language training certificate ".

According to enterprises, there are currently no legal documents explaining the concept of "native teachers" nor any regulations on which units are granted a language proficiency certificate from level 5. or higher according to the 6-level language proficiency framework used for Vietnam and/ or what is equivalent, which institution is granted an equivalent certificate, what type of certificate and certificates of overseas units is it recognized as equivalent or not?

As reflected by the enterprise, today, the lack of clarity in the legislation creates confusion for both the agency and the business and lead to inconsistencies when applied between management bodies in local, causing many difficulties for businesses.

It is known that the Ministry of Education and Training is currently developing a plan to reduce and simplify business conditions⁴ following guidance of Resolution 68/NQ-CP, it is expected that the problems outlined above will be considered for inclusion in the plan and to amend the relevant provisions in the future.

INADEQUACIES IN THE MANAGEMENT MECHANISM FOR SOME TYPES OF GOODS – DIFFICULTIES FACED BY BUSINESSES

Producing and trading in medicinal herbs is a conditional business line, and business entities in this industry must meet the business conditions as prescribed⁵. What types of medicinal herbs are considered as medicinal herbs and are subject to this mechanism are identified in the List of medicinal herbs specified in Circular 48/2018/TT-BYT. In which, many popular foods used in daily life are included in the list of herbs such as herbs (mint, lemon basil, basil, wormwood, marjoram, guise leaves, fish lettuce, nails...); spices (galangal, ginger, turmeric, pepper, cinnamon, lemongrass, gac, garlic...); nutritious foods (juzube, docynia, willow, lotus seeds, longan, lingzhi, cardamom...). This means that the entities trading these goods will be subject to the regulatory mechanism of the pharmaceutical law, must meet the pharmaceutical business conditions (even, the sellers of these foods must have location, storage facilities, means of transport, quality management systems, technical documentation and personnel that meet Good Practices of medical ingredients). This is unreasonable, and not feasible, because the above foods are not only medicinal ingredients, but also foods that are very common in everyday life and their use does not impact directly, followed by human health as pharmaceuticals. Therefore, applying the above management mechanism is not appropriate.

⁴ Report on the implementation of the tasks The Government assigned to the Ministry of Education and Training - the documents serving the meeting of the Prime Minister's Working Group on December 8, 2020 at the Ministry of Education and Training

⁵ Article 33 of the Law on Pharmacy 2016

On the other hand, some types identified as medicinal herbs in Circular 48/2018/TT-BYT are also identified as imported plant-based foods subject to food safety inspection under the jurisdiction of the Ministry of Agriculture and Rural Development specified in Circular 15/2018/TT-BNNPTNT (ginger, garlic, artichokes...). Thus, the same goods will be subject to two management mechanisms of two different regulatory agencies.

In fact, the above shortcomings have caused many difficulties for importers and caused confusion for customs authorities. Because, if managed according to medicinal herbs, the importers must satisfy the pharmaceutical business conditions while these enterprises have not had any activities in the pharmaceutical sector until now and of course not. These conditions cannot be met, and therefore cannot be cleared for imported goods. The customs authorities have adopted flexible oriented enterprises declaration of imports of goods for use as food, comply with the provisions in the legislation on food safety, pending the opinion of the related management agencies⁶.

⁶ <https://tuoitre.vn/gung-toi-dau-rau-thom-bong-bi-quan-ly-nhu-duoc-pham-20201230082010703.htm>

INSPECTION ACTIVITY - NOT YET TRANSPARENT

The inspection and examination of State agencies has a great influence on the operation of enterprises. Vietnamese law already has the Law on Inspection, which regulates enterprise inspection activities. Although they are not really transparent and reasonable, the provisions of the Inspection Law have also helped avoid the arbitrary or abuse of authority of many agencies and officials towards enterprises. For example, the Law on Inspection requires the inspection to have an annual plan, in the case of a periodic inspection to have an inspection decision and send it in advance to the enterprise, the enterprise is allowed to explain the draft Final investigation and conclusions must be provided to the business. The law also specifies specific timescales for each step of an inspection.

However, there are currently no such provisions for inspection activities. Meanwhile, there is an overlap between inspecting and examining enterprises about the content and legal consequences of these two activities. Therefore, the situation of many state agencies abusing inspection activities to harass enterprises still occurs.

In 2020, the Ministry of Finance shall draft a Circular guiding the inspection of accounting service providers' operations. The draft will empower agencies of the Ministry of Finance to examine businesses and individuals that provide accounting services. However, the draft does not clarify the relationship between inspection and examination, it is not clear whether the enterprise will be inspected and examined for the same content or not. In addition, the draft has not clarified many issues of inspection activities as a basis for checking irregular, time announced plans to test, the time limit for concluding check and give businesses, as well as yet, risk management principles have not been applied to the selection of auditing firms or service contracts for inspection.

This draft is an illustrative example that the Vietnamese legal system still lacks a lot of regulations for transparency and abuse of power in corporate auditing. This is an issue that needs to be studied and overcome in the future, possibly through the revision of the Inspection Law to include inspection activities.

THE NATURAL RESOURCE TAX LAW HINDERS THE DEVELOPMENT OF THE MINERAL MINING AND PROCESSING INDUSTRY

The inadequacies of the law on royalties have been reflected by businesses for a long time. However, the problem is not only in conflict over tax rates but also in the way of tax calculation and the stability of tax laws that make the mining industry and especially mineral processing difficult to develop. In 2020, the Ministry of Finance has developed a draft Circular amending Circular 152/2015/TT-BTC on natural resources tax.

Under the decrees and circulars guiding royalties, taxable prices include not only the value of natural resources extracted from the ground, but also the value generated from activities: screening, recruitment, enrichment, production, processing. This method of determining taxable prices makes enterprises motivated to transfer activities of screening, sorting, classifying, enriching content, and even mineral processing abroad to avoid tax. For example, suppose an amount of ore mined is worth 2 billion dong. Screening, sorting, and enrichment can increase the value of that resource to 3 billion dong. If the enterprise conducts this sorting, sorting, and enrichment activity in Vietnam, it must pay tax for the entire value of that 3 billion dong. If enterprises transport crude ore overseas and perform the screening, classification and enrichment abroad, they will only have to pay natural resources tax for the part worth 2 billion dong. Inadvertently, such a tax policy makes enterprises perform the screening, classification, and enrichment of content in Vietnam, the more tax they will have to pay compared to performing these steps overseas.

In addition, the royalties law allows businesses to declare taxable prices, but not lower than the price set by the provincial People's Committee. This provision is speculated to avoid the situation where the enterprise exploits resources in association with the buyer to record the selling price of resources on invoices and vouchers lower than the actual transaction price. This is essentially a price-shifting activity. Anti-transfer pricing is essential, but there are ways to do this. The popular practice in the world is to require businesses to prove that the price of the transaction corresponds to the price of other independent transactions (arm's length principle). Vietnam has adopted this approach since 2017 to combat transfer pricing in associated transactions for corporate income tax. However, for royalties, the taxable price fixing mechanism are still applied. More importantly, the authority to fix taxable prices rests with the PPCs.

The mineral industry is a business sector with very high risks, large investment capital, and long payback period. Therefore, maintaining an environment tax policy stability is very important in order to attract investors potential trading basically, using high technology, recovered fully finance original. However, with the current mechanism of the provincial People's Committee issuing the minimum taxable price, it increases the risks for large investors in the mineral sector. This is part of the reason why mineral mining projects in Vietnam are often small and fragmented.

SOME LAWS HAVE NOT ENCOURAGED THE FORMATION OF MULTI-SECTOR PRIVATE ECONOMIC GROUPS

Resolution 10-NQ/TW of 2017 of the Central Executive Committee on private economic development clearly stated the guiding viewpoint is *“to encourage the formation of private and multi-owned private economic groups to contribute capital to state economic groups, capable of participating in regional and global production networks and value chains.”* The common operating model of a private economic corporation is to have a parent company that plays the role of investment and funding its subsidiaries (may be called the ultimate company, holding company), The subsidiary will operate in production and business in an area or will be in charge of a specific project. Depending on the need for management and risk allocation, the corporation may have a number of intermediaries between the supreme company and the company directly engaged in production and business. In this model, the parent company based on reputation and their size, often assumed the role of capital from investors or financial institutions then refinance subsidiaries fledgling often very difficult to get loans.

Some legal regulations enacted or drafted in 2020 are not really friendly with this business model. The regulation on interest expense restriction in Clause 3 Article 8 of Decree 20/2017/ND-CP was revised in 2020. Decree 20/2017/ND-CP was issued to combat prices of corporate income tax abroad. Clause 3, Article 8 of the Decree restricts an enterprise's interest expense in associated transactions to not exceed 20% of its net profit from operating activities plus interest expenses and depreciation expenses during the period. This provision applies to both enterprises in Vietnam, even in the case that there is no tax difference between the two companies in the transaction. Thus, the case where the parent company borrows money from the bank and then lends it to the subsidiary as above will be governed by this Article 8.3 and the parties will no longer have flexibility to decide on the interest rate of the transaction. Obviously, this regulation is not really true to the policy of encouraging the formation of private economic groups operating in multiple industries. After the amendment, the interest expense control limit was raised to 30% and allowed to subtract the profit of the loan.

In 2020, the State Bank of Vietnam will also draft a Circular providing for credit institutions to buy corporate bonds. In which, there is a restriction on "Credit institutions are not allowed to buy corporate bonds issued for the purpose of contributing capital or buying shares in other enterprises". As such, this provision will not allow banks to buy bonds issued by parent companies in an economic group to raise capital and then use that amount to contribute capital to subsidiaries. In the explanation, the drafting agency said that the purchase of corporate bonds issued by credit institutions for the purpose of contributing capital, buying shares in other enterprises will make it difficult for credit institutions to check control the purpose of capital use, cash flow, project implementation. This concern is justified, but it can be completely resolved through the measures

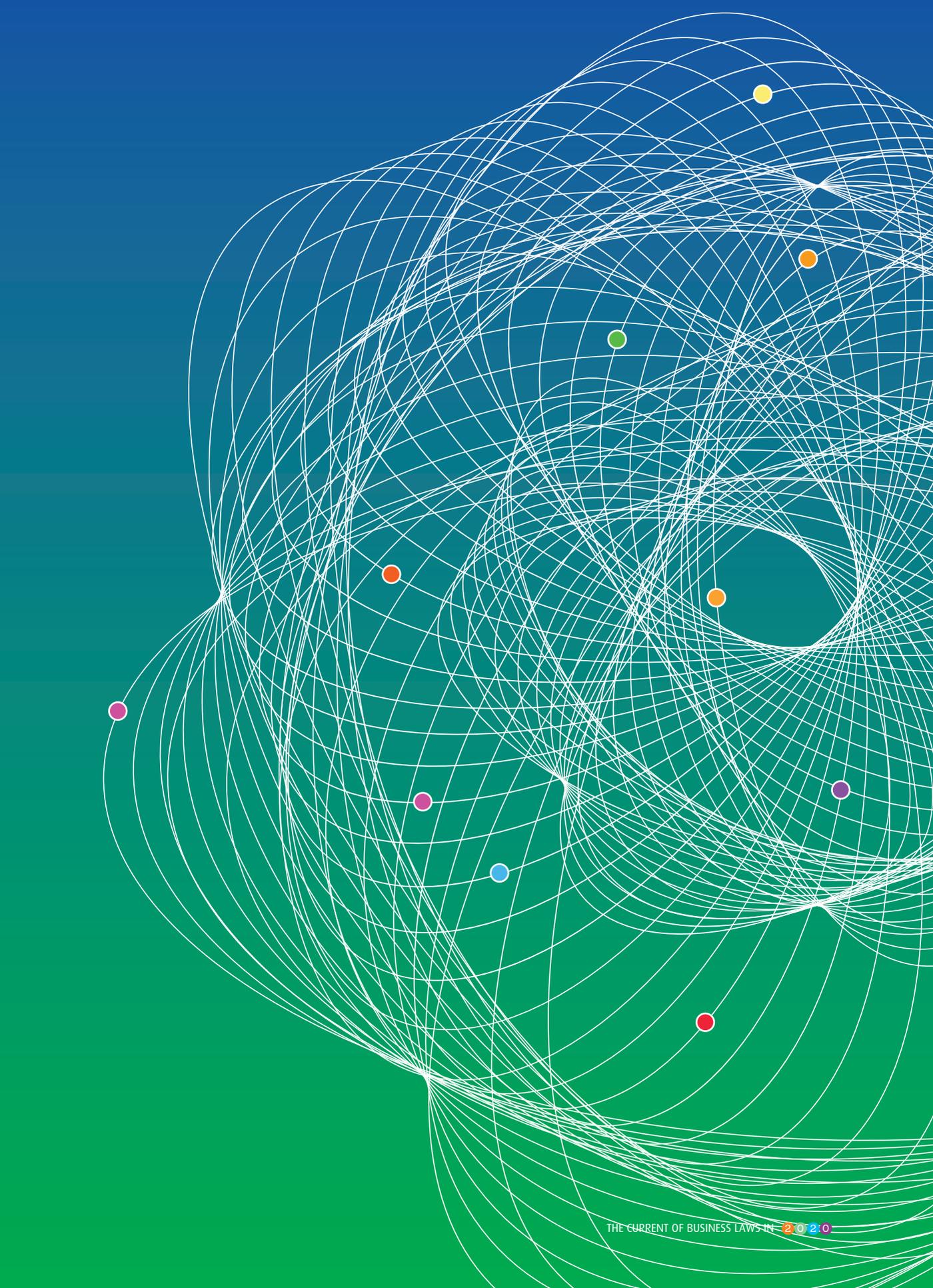
in the contract or the bond clause. Accordingly, enterprises that issue bonds to contribute capital or buy shares in other enterprises must commit in bond terms on the rights of bond holders to be allowed to control the purpose of capital use, cash flow, and project implementation in subsidiary company. Doing so will still help to ensure the bank's authority to supervise, but not affect the normal operations of multidisciplinary economic groups.



02

MARKET ENTRY – THE OBSTACLES

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BACKGROUND

In 2019, basing on recommendations of enterprises as well as local authorities, VCCI had synthesized and sent to the competent agencies a Report on 25 overlapping points among the laws on investment and business. The Report had shown a number of shortcomings and inconsistency among the laws on investment and business, which are obstacles to investors and local authorities.

Responding to the enterprises' recommendations, early 2020, the Prime Minister has established the Working Group for legislation review to identify the conflicted and overlapped regulations hindering the enterprises' development with focus on 11 thematic issues covering comprehensively most of business legislation system. VCCI, representative organization of business community was leading body in the process to review "*laws on conditions for market entry, management and operation of enterprises*". The Research Group has reviewed relevant regulations on conditions and procedures that enterprises should follow and/or implement to start their business (being considered as conditions for market entry); the regulations on management and operation of enterprises, including those on types/structures of enterprises, organization and operation of enterprises.

On the basis of reviewing 410 legal documents (57 laws, 260 decrees, 01 Prime Minister's Decision and 92 circulars), the Research Group found that: basically, the laws on market entry are quite complete with not many overlapped and conflicted regulations; those irrational regulations hindering the enterprises' development are seen in some certain sectors and industries, mainly related to conditions for business start and/or administrative procedure.

OUTCOMES

RECOMMENDATIONS BEING ACKNOWLEDGED AND SOLVED

The review was conducted from early 2020 to July 2020 marking the period of drafting, screening and adopting important laws namely Law on Enterprises and Law on Investment whose provisions significantly relate to regulations on conditions for business start.

The findings and recommendations withdrawn from the review were submitted by VCCI to the drafting agencies. As a result, a number of recommendations stated in the report of VCCI were reflected in the Law on Enterprises 2020 and Law on Investment 2020. For example, 07 trades and industries were removed from the List of conditional business lines issued as Appendices of the Law on Investment; the List of conditional business lines applied to foreign investors were also transparentized; in addition, the consistence among regulations on obligations of shareholders in the partnership was also achieved.

THE OBSTACLES IN MARKET ENTRY

In recent 4 years, the Government has conducted a number of reviews on business conditions (in 2016, a general review on more than 50 decrees related to business conditions; in 2018, a general review to reduce and simplify at least 50% of the then valid conditions; in 2019, the requirement for reducing and simplifying the business conditions were still raised to the Ministries) resulting in annulment and simplification of numerous irrational and intransparent business conditions, creating more favorable investment and business environment.

In this review of market entry conditions, remarkable progress and achievement of the policy makers are recognized in improving the market entry conditions. Majority of conditions were well and specifically structured that help to monitor the management goals in the conditional business lines. However, this does not mean less space for further reform of the market entry conditions. Some obstacles and shortcomings remain in market entry conditions (including business conditions, administrative procedure for market entry) that should be removed in the coming time.

Conditional business lines – possible further annulment

The List of conditional business lines (hereinafter referred as the List) of the Investment Law (versions 2014, 2016 and 2020) sees changes in the direction of shortening the List (from 267 to 243, then 227). By making a more transparent List of conditional business lines and removing the inappropriate trades and industries, the current List demonstrated the reform spirit as well as efforts of Government authorities.

Yet, by reviewing again, the Research Group still finds it possible to remove more trades and industries from the List.

In principle, the *trades and industries having indirect relevance or unprovable impacts* on the areas of national defense & security, social order & safety, code of ethics, public health (generally referred to as public interests) or those being controlled by standards or their output quality being selected and decided by customers *will not be defined* as conditional business and investment lines. The State will apply alternative management modality instead of mandatory business conditions. This is also considered as core criteria for the drafting agency when reviewing the List when drafting Investment Law 2020.

In addition, some eligible trades and industries should also be put into consideration to remove from the List such as:

The trades and industries having indirect relevance or unprovable impact on public interests namely: Accounting service business, Custom processing service business, tax processing service business; rice export, gold and jewelry business, handy craft business, employment service business.

BOX 1: EMPLOYMENT SERVICE BUSINESS

“Employment service business” is understood as a service provided to workers and employers. In other words, this is a job introduction service, a “private” relation between the employment service providers with workers and between the employment service providers with employers.

Basically, the employment service business could have impact on public interests in two aspects:

- › From positive aspect, this business line would help people to find jobs, reducing unemployment rate and ensuring the human resources for production and business needs of enterprises;
- › From negative aspect, workers could be victimized if this business line engages in providing service to those employers doing underground and illegal business activities or failing to comply with labor legislation ... Yet, in these cases, the main cause lies in the enterprises not employment service business. Moreover, without employment service business, there are still other channels to connect employers and job seekers.

Generally, it is possible to record certain level of this business line’s impacts on public interests but not so serious that need State’s control by means of business conditions, not mentioning to its benefits to labor market.

Therefore, rather than categorizing this business as conditional business, it should just be treated as normal one and controlled by common management framework (business and investment registration regulations ...).

The application of standards and management regulations in relevant legal documents is sufficient to control the impact level on public interests of these business lines such as: new building, converting, restoring and repairing of inland waterway vehicles; new building, converting, restoring and repairing of sea going vessels; printing service, excluding package printing; film production, distribution and dissemination business; traveling service; organizing of performing art show, fashion show and beauty & model contest.

BOX 2: NEW BUILDING, CONVERTING, RESTORING AND REPAIRING OF INLAND WATERWAY VEHICLES

It is necessary to control operation of inland waterway vehicles to guarantee public interests (traffic safety, people's health and life, assets, environment safety ...). However, the question is when this control method should be applied: before production (new building, repairing) of the inland waterway vehicle or before use (before the vehicle is put into use)?

The current regulations have strictly controlled the stage of "producing final products before being put into use", for example: those newly built vehicles must be registered to get Certificate for technical and environment safety; during operation, the vehicles must be periodically registered and extraordinarily inspected⁷...The registration and inspection are based on technical standards.

That means in whatever facilities are the inland waterway vehicles newly built or repaired, the quality control (to guarantee relevant public interests) must still be based on the checking and issuing of Certificate for technical and environment safety of each and every vehicle.

Consequently, it is meaningless to apply business conditions for controlling the subjects of inland waterway vehicle new-building or repairing service business. Therefore, "the inland waterway vehicle new-building or repairing services" should not be defined as conditional business line.

⁷ Circular 48/2015/TT-BGTVT

The business lines without obvious typical characteristics comparing with other normal business of similar lines. The business conditions are applied to certain business lines because of their *typical characteristics* in comparison with other normal business lines that have impacts on public interests to the extent that State must control by application of conditions before doing business: temporary import for re-export of frozen food products; car warranty and maintenance business.

BOX 3: TEMPORARY IMPORT FOR RE-EXPORT OF FROZEN FOOD PRODUCTS BUSINESS

It is hardly proved that the frozen food products temporarily imported for re-export offers higher risk on public interests than other similar products (at least when comparing with the imported/exported frozen food products or other temporarily imported for re-export non-frozen food products – while the temporary import for re-export process of these products are not subject to control regulation by business conditions).

The temporary import for re-export of frozen food products is one *activity* in the business process not a *business line* (as no enterprise would be set up just for temporary import for re-export of frozen food products, normally, this service is provided by food production and trading companies in addition to other activities such as food production, trading, import/export ...). The subject to be controlled in this case is not the enterprise but the temporary import for re-export activity of the enterprise. Thus, not the business conditions applied to subjects implementing the temporary import for re-export of frozen food products but the customs control (customs procedure, border gate to border gate transportation) to each shipment of temporarily imported for re-export frozen food products should be used as the control tool.

According to explanation of government authorities⁸, “the Decree number 69/2018/NĐ-CP on business conditions for temporary import for re-export service is applied only in cases of enterprises implementing temporary import for re-export activity in the Northern border gates. Other cases are not regarded as conditional temporary import for re-export business”. Yet, the regulations in Decree number 69/2018/NĐ-CP fail to reflect this explanation, it is even applied to all enterprises implementing temporary import for re-export of frozen food products.

Another cause to apply condition for this business line is unfair competition among economically unpotential enterprises resulting in instability and difficulty in management. In relation to unfair competition, the State should use management tools provided by Competition Law instead of administrative measures interfering enterprises’ freedom of business.

Hence, it is inappropriate to define this business as conditional business line.

⁸ In the position paper of Ministry of Industry and Trade on Review Report of Group 1

Apart from above-mentioned points, the List mentions business lines of similar management scheme, but some of them are excluded from conditional business lines while the others remain. For example: “food trading under jurisdiction of Ministry of Health” is removed from the List, but “food trading under jurisdiction of Ministry of Industry and Trade”, “food trading under jurisdiction of Ministry of Agriculture and Rural Development” remain. Food trading with similar management scheme follows the regulations of Law on Food Safety, therefore, removing the food trading under jurisdiction of this Ministry while keeping other Ministries in the List reveal the inconsistency in the management policy on conditional business lines.

Management measures on certain conditional business lines – an overlap and administrative burden to enterprises

Conditional business lines would be managed by corresponding government authorities on basis of their assigned functions, duties and rights that will control the business subjects’ satisfaction of business conditions.

Through review process, the Research Group found the overlap in the management functions of different government authorities on conditional business lines.

For example, according to Decree number 96/2016/NĐ-CP and Decree number 87/2018/NĐ-CP, “gas business” is conditional business line. To get permission for this business line, the traders must apply for two permits: Certificate for Eligibility for Security & Order and Certificate for Eligibility for Gas Business. The dossier to apply for these two permits should enclose with “documents proving satisfaction of fire prevention and fighting conditions”. Thus, regarding the “gas business”, two different authorities involve in evaluating the fire prevention and fighting conditions, which creates administrative burden to the business subjects.

“Adventure travel” and “extreme sport activities” also see the overlap in terms of management. According to Circular number 04/2019/TT-BVHTTDL and Decree number 168/2019/NĐ-CP, some sports are duplicate of health and life risky tourism products (mountain biking, off-road game, paragliding, rock climbing, scuba diving). Those tourism products should be managed in the way that organizations and individuals directly providing this services must inform Departments of Culture, Sport and Tourism who will “inspect and publish on their websites List of organizations and individuals eligible for safe measures”. With regard to extreme sport activities, the enterprises should complete procedure to be verified and certified as Eligibility for Sport Business by sport specialized agency under province People’s Committees.

Then, according to above mentioned regulations, the enterprises providing extreme sport activities that are duplicate of health and life risky tourism products will have to implement two procedures to get their permit (procedure to get certificate issued by sport specialized agency and procedure to inform and being examined for eligibility by tourism authority), which creates administrative and cost burdens to enterprises when starting and implementing their business.

Business conditions in some business lines – failure to ensure the rationality and transparency

According to Paragraph 4 Article 7 of Investment Law, the business and investment conditions are designed for purpose of ensuring national defense & security, social order & safety, social conducts, public health, transparency, disclosure, objectiveness, investors' time and compliance cost saving. That means the business conditions must aim to well control the risks from business activities' impacts on public interests (for purpose of ensuring national defense & security, social order & safety, social conducts, public health). If this objective fails, the regulation on business conditions is proved inappropriate.

Through review process, the Research Group found inappropriate business conditions in some business and investment lines:

➤ CHARTER CAPITAL

The requirement on charter capital exists in particular capital intensive business lines and without which the enterprises' business would have impacts on public interests. For example, the bank – whose business mainly bases on money receipts and loans, should qualify the capital related condition.

It is not reasonable to require several conditional business lines without typical characteristics to meet condition for charter capital (as the charter capital related condition providing guarantee for the business activity cannot prove on what public interests it will affect). Therefore, it becomes considerable obstruction to enterprises' market entry, especially those with low economic potential.

Charter capital requirement in business condition of such business lines as credibility rating service providers; credit information providers; publishing house's business; and postal business is groundless.

BOX 4: CHARTER CAPITAL CONDITION OF CREDIBILITY RATING SERVICE PROVIDERS

According to Decree number 88/2014/NĐ-CP, Decree number 151/2018/NĐ-CP, the enterprises providing credibility rating should satisfy the condition on charter capital of 15 billion Vietnam dongs.

“Credibility rating” is conducted mainly by “analyzing, identifying and rating the ability of full and timely fulfillment of enterprises and organizations' debt obligation” (Paragraph 5 Article 4 Decree 88/2015/NĐ-CP). Owing to its characteristics, this service is conducted basing on high skill human resources and available rating tools.

It is not clearly proved for what aspect of State management goal the capital requirement would serve? If this requirement aims to ensure enterprises' effective operation, it would not be a proper objective for designing this business condition because it is a matter of market where enterprises must qualify for the sake of their existence, competition and development. In case this requirement aims to constraint the market entry of business subjects, then the question is that if many professionally qualified business subjects provide credibility rating service, which public interests would be affected to the extent that the State must re-organize this market?

Considering all the above mentioned factors, the charter capital condition for this business line is groundless.

➤ BUSINESS PLAN

The availability of “business plan” at the time of applying for business license is one of the requirements to some conditional business lines. This condition is inappropriate, meaningless and intransparent because “business plan” could adjust up to the change of market, strategy and operation purpose of enterprises. It could even change right after getting the business license while the government authority has no control mechanism (it is impossible to require the enterprises to inform government authority every change of their business plan due to incurred complicate administrative procedure), therefore, this condition has little meaning.

On the other hand, from aspect of transparency, it is not clear basing on what criteria, the licensing agency will examine and assess the “business plan” of enterprises? One of the business conditions requiring enterprises to have “feasible business plan” – how and basing on which factors “feasible” would be defined? Whether the in charge evaluators are competent enough to examine and evaluate enterprises’ “business plan” as feasible or not?

BOX 5: “BUSINESS PLAN” RELATED CONDITION

Some business conditions related to “business plan”

- Decree number 88/2014/NĐ-CP, Decree number 151/2018/NĐ-CP stipulating the credibility rating service providers to have “Business plan with detailed information regarding: Estimated revenue and operating costs; Expected source of date for use”;
- Paragraph 2 Article 21 Law on Post 2010, Paragraph 1 Article 5 Decree 47/2011/NĐ-CP stipulating the licensed enterprises in post business must satisfy some conditions, including: having feasible business plan in line with regulations on postage rates and service quality;
- Part d Paragraph 1 Article 42 Law on Cyber Information Safety 2015 stipulating that one of the conditions to get Permit for cyber information service and products safety business is “having suitable business plan”;
- Article 1 Decree 57/2016/NĐ-CP, Article 4 Decree 16/2019/NĐ-CP stipulating that one of the conditions to get Permit for eligibility for credit information is “having feasible business plan”.

➤ UNCLEAR BUSINESS CONDITIONS

This indicates the business conditions being formulated in qualitative manner and using such phrases as “sufficient”, “appropriate”, “necessary” that results in different interpretations between enterprises and licensing agencies. This will create risk of harassment by officers to enterprises.

BOX 6: UNCLEAR BUSINESS CONDITIONS

- Conditions for set-up and operation of publishing house: “Having adequate equipments for publishing activity” (Article 8 Decree 195/2013/NĐ-CP, Paragraph 3 Article 1 Decree 150/2018/NĐ-CP);
- Conditions for registration of providing information services on mobile telecommunications networks: “Having sufficient financial, technical, organizational, human resources capacity appropriate with operation scale” (Part b Paragraph 2 Article 27 Decree 72/2013/NĐ-CP);
- Conditions to get license for nuclear energy application support services: “having suitable specialized profession and experience” (Part b Paragraph 1 Article 70 Law on nuclear energy 2008);
- Conditions for gold jewelry and handy craft business: “Having location with facilities and necessary equipments for production of gold jewelry and handy craft products” (Article 5 Decree 24/2012/NĐ-CP);
- Conditions for issuing of Certificate for Eligibility for fertilizers trading: “Having legal, clear trading location” (Part a Paragraph 2 Article 42 Law on Crop Production);
- Conditions for business in plant protection service: “Having suitable equipment for providing plant protection services”; “Having legal, clear trading location” (Part b, c Paragraph 1 Article 23 Law on Plant Protection and Quarantine 2013);
- Conditions for conducting transportation by automobile business: “Having parking area suitable with operation scale of enterprises, cooperatives, business households in compliance with regulations on order, safety, fire prevention and fighting as well as environment protection” (Part đ Paragraph 1 Article 67 Law on Road Traffic 2008);
- Conditions for antiques inspection business: enterprises providing antique inspection service must “have equipments and facilities for inspection suitable with registered business” (Paragraph 2 Article 4 Decree 61/2016/NĐ-CP).

➤ OTHER INAPPROPRIATE BUSINESS CONDITIONS

These are conditions being formulated to directly interfere parties' freedom of contract that have little meaning in State's management activity. For example, requiring enterprises to have rental contract of warehouse/transport vehicles with minimum validity of five (05) years. This regulation, by guessing, aims to ensure that enterprises *truly* have facilities as stipulated. However, the design of condition requiring contract availability with minimum validity is not reasonable because the contract is formulated basing on agreement of parties. In the process of implementing the contract, one of parties could terminate the contract before expiration date. In this case, the condition on contract's minimum validity has little meaning.

BOX 7: CONDITIONS FOR PETROL & OIL IMPORT AND EXPORT BUSINESS

Article 7 Decree 83/2014/NĐ-CP stipulates conditions for enterprises doing petrol & oil import and export business:

- Having a special-use wharf in Vietnam's international port system, which is capable of receiving oil tankers or other petrol and oil transport vehicles with a tonnage of at least seven thousands (7,000) tons under its ownership or co-ownership or on a lease for at least five (05) years (Paragraph 2);
- Having a depot with a minimum capacity of fifteen thousand cubic meters (15.000 m³) to receive petrol and oil from oil tankers and special-use transport vehicles, which are under its ownership or co-ownership or on a lease for at least five (05) years (Paragraph 3);
- Having vehicles for domestic petrol and oil transport under its ownership or co-ownership or on a lease for at least five (05) years from a petrol and oil service provider (Paragraph 4).

Another unreasonable business conditions is the requirement for professional qualification of managerial positions. With regard to the business lines depending on professional capacity of human resources (such as consultancy, inspection), it is necessary and reasonable to set rule for professional qualification of direct service providers. However, concerning those in managerial positions such as member of Board of Directors/Board of Members, it is not really suitable to set the requirement for professional qualification because they do not engage in directly providing professional services – therefore, public interests are little impacted.

BOX 8: CONDITIONS REGARDING HUMAN RESOURCES OF ENTERPRISES PROVIDING CREDIT INFORMATION

Article 1 Decree 57/2016/ND-CP, Article 4 Decree 16/2019/ND-CP stipulates human resource related conditions to get Certificate for eligibility for credit information:

- President of Board of Directors, President of Board of Members, President of company must have university or postgraduate degree in one of following majors: economics, accounting, finance, banking, IT and at least 3-year experience working in finance, banking, IT sectors;
- Members of Board of Directors, Board of Members, partnership must have university or postgraduate degree with at least 50% of whom holding university or postgraduate degree in one of following majors: economics, accounting, finance, banking, IT and at least 3-year experience working in finance, banking, IT sectors;
- General Director (Director), Vice General Director (Vice Director) must have university or postgraduate degree in one of following majors: economics, accounting, finance, banking, IT and at least 2-year experience holding managerial positions in enterprises operating in finance, banking, IT sectors;
- Member of Control Committee must have university or postgraduate degree in one of following majors: economics, accounting, finance, banking, IT and at least 2-year experience working in finance, accounting, auditing, banking, IT sectors.

MARKET ENTRY PROCEDURE – LACK OF CONVENIENCE

Administrative procedure of market entry is compulsory for enterprises' compliance to *start* operating in expected business lines (for example, the enterprise establishment procedure; business licensing procedure for conditional business lines).

Enterprise establishment procedure

Among administrative procedures related to market entry, the enterprise establishment procedure is evaluated to have improvements, creating favorable conditions for business subjects to start their business. However, this procedure is facing the problem of consistency. Currently, there are two system for enterprise establishment including Law on Enterprises and specialized law with provision on enterprise establishment (only some judicial business lines such as notary office, lawyer office, assets auction, judicial expertise, bailiff follow a different procedure for enterprise establishment).

The existence of two regulation systems related to enterprise establishment raises following questions:

- The business entities in the above mentioned industries, by their nature, are enterprises with organizational structure similar to various types of enterprises prescribed in Law on Enterprises. The market entry procedure of other conditional business lines requires to set up enterprise as stipulated by Law on Enterprises and then apply for business license as stipulated in specialized law. Therefore, there is no point for these business lines to follow a different enterprise establishment;
- There could be a law overlap when it comes to the existence of two enterprise establishment legislation systems causing inequality among enterprises. For more details, according to regulations on enterprise, it is possible to register the enterprise establishment in all business lines, except the prohibited ones. It means different procedures could be applied to business registration while according to specialized law, the business entities engaging in these particular business lines do not need to register for enterprise establishment but to apply for establishment and operation license.

In the past, some business lines such as “banking”, “insurance”, “securities” registered their establishment as stipulated in specialized law not in Enterprise Law. However, at present, the registration should follow the Law on Enterprises. Therefore, it is necessary to re-consider the fact that some business lines still follow a different procedure on enterprise establishment.

Business licensing procedure

Basically, the regulations on administrative procedure for business licensing are designed clearly with concrete implementation steps, duration, licensing agencies. Yet, some licensing procedures remain detrimental:

➤ UNNECESSARY DOCUMENTS BEING REQUIRED IN THE DOSSIER

This indicates the regulations on providing unnecessary documents in the dossier that do not serve any State management goals or requesting additional documents that do not represent any forms of business conditions. This results in increased costs and time for enterprises.

BOX 9: DOSSIER TO APPLY FOR RE-ISSUING AGENCY LABOR LICENSE

Part d Paragraph 2 Article 11, Paragraph 2, 3, 4, 5, 6 Article 8 Decree 29/2019/NĐ-CP provide that in case of lost, burnt or damaged license with incomplete information on its surface, the enterprise must submit following documents in its dossier applying for license re-issuing:

- Copy of Certificate of business registration as stipulated by the law;
- Copy of enterprise's legal representative CV;
- Judicial records (form No.1) of the legal representative;
- Document proving the service period of enterprise's legal representative;
- Certificate of deposit of agency labor business;
- In case of lost or burnt license, the confirmation paper issued by local authority where the incident happens is needed.

In fact, in this case, there is no change in enterprise's operating conditions, government authorities do not need to inspect the conditions for license issuing, therefore, it is not reasonable to require submission of all documents as in case of new application.

The requirement for submitting confirmation paper of local authority regarding the lost or burnt license in the re-licensing dossier will cause trouble for enterprises because the license is truly lost or not, the re-licensing of the issued license for enterprises would not have any impacts on State's management goal in this area. Thus, the local government's confirmation of the lost or burnt license is not necessary. Meanwhile, in fact, local government hardly has ground to confirm the lost or burnt license.

➤ INAPPROPRIATE CONTENT OF SAMPLE DOCUMENTS

Normally, the sample documents should present necessary content to serve the State's management goal, which often are requirements stated in business conditions. The sample documents' request for additional content comparing with requirements in business conditions fails to ensure the consistence and at the same time, increases administrative costs.

BOX 10: SAMPLE LICENSE FOR ALCOHOL BUSINESS

The sample alcohol business license as prescribed at Appendix of Decree 17/2020/NĐ-CP presents information about name, address of alcohol producer, distributor, wholesaler. This means the licensed trader is allowed just to trade the alcohol products of other traders mentioned in the license.

According to Paragraph 1 Article 26 Decree 105/2017/NĐ-CP, the trader should implement procedure to revise and supplement the license if any changes in license's content. In other words, if the licensed trader changes the alcohol producer, distributor, wholesaler, it is compulsory to implement procedure to revise, supplement the license.

This regulation will create administrative burden to alcohol trader because:

- The change of alcohol supplier happens regularly, therefore the regulation on revising of license whenever there is a change of supplier, even only his/her address will create enormous administrative burden to enterprises;
- According to Decree 105/2017/NĐ-CP, Decree 17/2020/NĐ-CP, one of elements being taken into account when licensing alcohol business (distribution, retail, wholesale) is to examine if the distributor, wholesaler, retailer have alcohol supplier but not the conditions of supplier (which means evaluating if the alcohol supplier is proper or not)? Therefore, it is not reasonable to state specific name of alcohol supplier.

➤ COMPLICATE PROCEDURE

This procedure is composed of various application phases in management authorities when it is possible to combine and simplify this procedure while ensuring management goal.

BOX 11: PROCEDURE AND STEPS FOR MUSEUM ESTABLISHMENT AND LICENSING

According to Paragraph 2 Article 50 Law on Cultural Heritage 2001, Paragraph 25 Article 1 of the Law on amending, supplementing some articles of Law on Cultural Heritage 2009, Article 28 Decree 98/2010/NĐ-CP, Part e Paragraph 3 Article 2 Decree 01/2012/NĐ-CP, in order for private museum to apply for operating license, the organization and individual must implement following procedures:

- ① **To get Certificate for eligibility for museum establishment issued by Director of Department for Culture, Sports and Tourism.**

Dossier includes: Application form and Operational Plan of the museum

Processing duration: 15 days since the receipt of valid dossier, the Director of Department for Culture, Sports and Tourism will issue Certificate for eligibility for establishment and for license issuing.

- ② **To get license issued by Chairperson of provincial People's Committee**

Dossier includes: written request for museum establishment; Certificate for eligibility issued by Director of Department for Culture, Sports and Tourism

Processing duration: 30 days since the receipt of valid dossier

These procedures are not rational creating administrative burden because:

- These two procedures could combine into one as the Department for Culture, Sports and Tourism is advisory body for Chairperson of provincial People's Committee with regard to cultural management that could propose to the Chairperson of People's Committee to issue the license after it confirms the eligibility of the applicant. The separation into two procedures would unnecessarily complicate and prolong the licensing process;
- In the procedure number (2): the processing duration of 30 days is too long whole the dossier's documents have been expertized beforehand.

EVALUATION AND RECOMMENDATIONS

Basically, the regulations on market entry have been completed, creating legal foundation for managing the business activities of enterprises, cooperatives of all lines. However, some regulations remain inconsistent, irrational, unfeasible hindering the business activities of business community that may come from a number of reasons:

- *Criteria to define conditional business lines and business conditions:* Investment Law 2014 defines conditional business lines and business conditions for the purpose of ensuring “national defense & security, social order & safety, social conducts, public health”. However, when defining the conditional business lines or the business conditions, the law makers fail to justify this purpose. Therefore, the regulations on market entry conditions are sometimes unsuitable, having considerable impacts on enterprises’ “freedom of business”.
- *The monitoring of legal documents’ quality:* The criteria of consistence, transparence, rationality, feasibility are always taken into account when screening quality of a legal document, yet in fact, a number of legal documents provide regulations failing to satisfy these criteria. This shows poor control of legal documents’ quality in the law making process.
- *The enforcement in reality:* The review process of Research Group was designed basing on comments of enterprises, associations and local authorities. Through screening the feedbacks, it is possible to realize that the inconsistent enforcement in localities is caused by different interpretations of a regulation. This may come partly from the capacity of the officers, but mostly from intransparent and unclear wording in the legal documents failing to create common understanding among subjects of application.

On other hand, the question of law enforcement is regularly raised during the process of collecting feedbacks from enterprises. This is viewed as big obstacle for enterprises’ market entry. For example, the business licensing process could be delayed because of an official dispatch from higher management level or business registry officer requesting to write the name of registered enterprises in words not numbers.

- *Too heavy and complicate legal document system:* Basically, Vietnam’s business law system is quite complete covering most of areas. However, this system has so many legal documents, a number of which are issued to amend and supplement numerous documents at the same time. The changing legal documents results in ongoing revision and supplementation, which makes it very difficult for document tracking and searching, especially for identification of effective regulations by the subjects for application, particularly the enterprises.

In order to handle the overlap, conflicts, irrationality of legal documents hindering business activities of enterprises, the following recommendations should be taken into account:

- *Policy position should be agreed before defining the conditional business and investment lines as well as the business conditions. The drafting agencies should grasp thorough understanding of this position when drafting the legal documents;*
- *It is necessary to have mechanism to ensure effective function of the “gate keeper” bodies in the law making process;*
- *To provide training for local government officers to improve their capacity as well as the consistent understanding and application of legislation;*
- *To promote the systemization and publishing of easy to find legal documents to ensure the implementation by subjects of application.*



03

LEGAL FRAMEWORK FOR DIGITAL ECONOMY

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The growth rate of a digital economy in Vietnam in recent years has always been at a very high level. According to estimation of Google and Temasek in the e-Conomy SEA 2020, Vietnam's internet economy in 2020 will reach about \$14 billion U.S. dollars and is forecasted to reach \$54 billion by 2025⁹.

The Covid-19 pandemic has caused an explosion in the demand for internet use of the Vietnamese people in the context of rapid growth of digital economy in the region and across the world. Prior to the pandemic, Vietnamese people in particular had been spending 3.1 h/day accessing the Internet on average (for personal purposes). During the social distancing, this number has risen to 4.2 h/day and now stands at 3.5 h/day. Number of internet services users in Vietnam recently increased by 44%, which is much higher than in the region, and 94% continue to use new services. All industries have strong growth compared to the previous year, except tourism: 46% in E-commerce, 50% in transportation and food, 18% in online communication, etc., while online travel decreases 28%. Investment in the internet sector in Vietnam also exploded last year with 151 transactions worth 935 million U.S. dollars.

Such a rapid development of the digital economy has been a positive shift for Vietnam's economy and society. However, a number of problems have arisen and the State's intervention is needed for more effective functioning of the economy, while reducing negative impacts on society. The role of the State in building and ensuring effective implementation of legal corridors for the digital economy is extremely important in this phase. Reasonable, feasible and fair future proof regulations will enable fast, sustainable and healthy growth of digital economy. On the contrary, regulations designed in an unreasonable, unfeasible or unfair way may bar Vietnamese economy from being on par in digital transformation with the region, particularly ASEAN as well as the rest of the world. Besides, young and talented Vietnamese developers and start-ups, which are on the rise, are in the need of an enabling environment to test their innovative ideas in the local market, and then gradually expand to the region and global market.

Vietnam has been connected to the internet since 1997. Along with the development of the internet in Vietnam over 23 years, the legal framework for internet use has also been increasingly promulgated. However, it must be frankly admitted that the reality of the development of the internet is too fast and that the legal institutions of Vietnam seem to be slow in keeping up with that development. It might just be the reason that completing regulations for digital economy is the policy focus of the Government at this stage. It is important to adopt an approach that meets the increasing market demand, at the same time keeping up with the development of technology in anticipation of the strong growth of Vietnam's digital economy in the next five years as mentioned above. The legal framework should balance between regulating and oversight functions of the state authorities combined with self-regulation by tech players, together with users' digital literacy and safety education on cyberspace. In particular, this process should fully consult businesses under the scope of regulation to avoid unintended impacts that hinder the development of Vietnam's digital economy.

The Government has been planning to amend Decree 52/2013/ND-CP on e-commerce, Decree 72/2013/ND-CP on the management, provision, and use of Internet services and online information, Decree 06/2016/ND-CP on management, provision and use of radio and television services and now is going to issue a new Decree on personal data protection. This is an important occasion to provide an overview of the legal system related to the digital economy in Vietnam.

⁹ Google, Temasek and Bain, e-Conomy SEA 2020, <https://economysea.withgoogle.com>

In June 2020, Prime Minister approved National Digital Transformation Program to 2025, with orientation to 2030. As such, Vietnam will approach digital transformation in the direction of satisfying users' growing needs in digital environment, and keeping up pace with fast – developing technology for next 5 years. Legal framework for digital economy, therefore, needs to harmonize state governance leverage, suppliers' self – adjusting mechanism, and raising users' awareness. Completion of this framework also requires contribution from business community and relevant stake – holders in order to avoid undesirable negative impact on Vietnam digital economy.

The next section of the Current of Business Law in 2020 Report will address the legal framework for digital economy, including:

Developing telecommunication infrastructure for the current high-speed internet

Frequency spectrum masterplan for 4G and 5G development

Investing and applying for a license to provide services in digital environment

Services that must meet business conditions and applying for a license

Services that limit market access for foreign investors

Protection of intellectual property for digital economic development

Recognition of digital assets

Protecting digital assets in civil and labor contracts

Protecting digital assets by criminal law

Censorship of information content in the internet environment

Content subjected to removal

Content censorship mechanism: pre-check and post-check

Protection of users' data

Information gathering, user authentication

Storage and application of users' data

- Prevention of selling and buying users' data
- Anti-spam mails, spam messages, spam calls

Provide information to government agencies

Taxes

Contractor tax collection for cross-border services

Collection of online sales tax

Mechanism for testing financial technology

DEVELOPMENT OF TELECOMMUNICATIONS INFRASTRUCTURE FOR HIGH-SPEED INTERNET

Development of high-speed internet, 4G and especially 5G, has been a race for many countries. 4G and 5G technologies are expected to create a breakthrough, a "highway" to expedite digital economy. Vietnam has had 4G for many years and is in trial phase for 5G, which is expected to become commercial next year. However, the problem is that Vietnam's current frequency spectrum masterplan is currently not suitable for 5G.

In 2020, the Ministry of Information and Communications (MIC) has developed many legal normative documents related to frequency spectrum planning and frequency spectrum auction. Notable documents include: Circular 18/2020/TT-BTTTT on planning frequency spectrum bands 2300-2400 MHz and 2500-2690 MHz, Circular No. 19/2020/TT-BTTTT on planning frequency spectrum band 24.25 - 27.5 GHz. These are the appropriate bands for 4G development at the moment and for 5G in the future. MIC is drafting options to rewrite masterplan the frequencies currently used for 2G and satellites to make room for new technologies.

In addition, noticeably the agencies are also drafting a decree on auctioning and transfer of the right to use radio frequency to submit to the Government for promulgation. This is an important document, creating a mechanism for distributing frequency spectrums for efficient use by businesses. Currently, Vietnam has 5 mobile terrestrial telecommunications service providers, of which 3 have large market share and 2 have small market share. These enterprises will be allowed to participate in frequency band auction according to the above Decree. This frequency spectrum masterplan will shape the structure of Vietnam's telecommunications market in future.

During the drafting process of above documents, the notable policy debate is: how should the bands be divided into large and small blocks to balance between the competitiveness in the market and the efficiency of 5G development in the future. Division of the band into small blocks, and limiting number of blocks that single business can buy will provide larger number of businesses with an opportunity to participate in the market, and therefore increase competitiveness. However, providing 5G services on small bands is not as efficient (in terms of speed and stability of transmission) as on large bands.

Putting it simpler, it can be envisioned as like when state needs to devise a planning for a certain tourist area for construction of hotels in it. If divide the land into many small lots, each person is limited to buy 1 or 2 adjacent lots only, then many people can participate in the auction, build many hotels, therefore create competition in the market, and tourists will be better served. However, each lot is small and can only accommodate small hotels. Doing otherwise, if the whole land lot is divided into one or two large lots or abolish limitation of number of lots a single person can buy, large-scale hotels can be built.

Apparently, the policy options that MIC favored is dividing the spectrum band into large blocks and allowing a single business to purchase a larger frequency band. This will help to better deploy 5G technology in the future, but will also pose the problem of ensuring a competitive environment among businesses.

To develop high-speed internet, proper frequency planning and allocation is just the first step. More importantly, businesses investing in 4G and 5G need to attract customers to use the service to quickly generate revenue and payback investments. Therefore, during first phase, the development of services that require high-speed internet such as video on demand, online gaming, online meetings etc. will have come – back effect on boosting 5G growth.

The Government should also consider facilitating additional investments in marine cables in Vietnam in order to increase capacity and allow reserve routing, and at the same time decrease bandwidth costs.

INVESTMENT AND APPLICATION FOR LICENSE FOR SERVICE PROVIDING IN INTERNET ENVIRONMENT

BUSINESS CONDITIONS AND LICENSE FOR SERVICE PROVIDING IN INTERNET ENVIRONMENT

Services in network environment are extremely diverse, from searching tools, e-mails, messaging, social networks, banking, payment, newspapers, news, route navigation, gaming, translation, e-commerce, education, taxi booking, food ordering, transportation, data storage, movies, health tracking, image sharing, music listening, book reading, tracking financial information, securities, public transporting, photo editing, etc. It appears that there is no limit to the services that can be provided via the internet.

Vietnam legal system currently regulates a number of services that requires permission when provided through the internet environment. According to the research team, the following services are subjected to conditional business (only some popular services are mentioned here, uncommon services are excluded from the list).

› Payment intermediary

Decree 101/2012/ND-CP on non-cash payment has been proposed for revision

› E-commerce activities

Decree 52/2013/ND-CP on e-commerce has been proposed for revision

› Social network

Decree 72/2013/ND-CP on online information has been proposed for revision

› Online gaming

Decree 72/2013/ND-CP on online information has been proposed for revision

› General information electronic site

Decree 72/2013/ND-CP on online information has been proposed for revision

› Press activity

Press Law

In addition to above internet – based services, there are many other services that used to be provided offline, now transferred to the internet environment, which also raises questions about how the licensing shall be like, especially when the governing measures for the offline activities are no longer suitable for managing online ones:

› Fee - based radio and television services

Decree 06/2016/ND-CP on radio and television has been proposed for revision

› Publishing

Publication Law

› Movie dissemination

The Cinematography Law has been proposed for revision

› Advertising

Decree 181/2013/ND-CP on advertising has been proposed for revision

In addition, some services that newly appeared based on Internet advantages also pose legal issues challenges.

› Transport connection service

Regulated by Decree 10/2020/ND-CP on business conditions for automobile transport services

› Virtual currency

Regulated by legal regulations on asset in civil laws

› Peer-to-peer lending

Regulated by legal regulations on contracts in civil laws

As recommended by many businesses, the problem of business investment conditions and licensing for services provided on the internet environment create numerous shortcomings. Namely:

Business scale is not differentiated

Many services, such as social networks, general information electronic sites, online electronic gaming, e-commerce websites, e-commerce exchanges which do not have online ordering, online radio, television, online movie dissemination, etc. have a diverse business scale, and include very large businesses, individuals and start-up microenterprises. Market characteristic of these services is that many initiatives, new products are continuously launched, but the majority will fail, only a few products and services can grow to reach large scale. This feature makes the licensing of all services inappropriate:

- *Firstly*, regulations on investment and business conditions seems to only fit big scale enterprises, which is not suitable to individuals and start-ups. It seems that lawmakers look at those large-scale businesses, products and services to set regulations, while it is difficult for small businesses to meet these conditions;
- *Secondly*, adding compliance costs (conditions and licenses) to newly created services and products increases cost of market entry, significantly reduces number of products that can be offered for testing on the market. This significantly reduces the growth rate of this digital economic services industry;
- *Thirdly*, most importantly, the undesirable negative effects of services often only arise substantially in large-scale services. For example, fake news will have a huge impact on a large social network, and a very small impact on a small social network; video games with pornographic and violent scenes only cause a great impact when the number of players is large enough or when players are under aged. Therefore, governing measures, especially licensing and business conditions, will be effective only when applied to products and services with large user scale.

In drafting process of above legal documents, drafting agencies, especially MIC, currently have made a policy of differentiating services by scale. According to such policy, products and services with low traffic volume and a small number of members do not have to go through licensing procedures, rather need to meet some very basic regulations. Only when social networks and websites reach a certain scale shall they meet stricter business conditions as to ensure users' benefits, and have apply for permits. This governing method is consistent with the market general development. Usually, while introducing new product, businesses do not know how users will respond, therefore, will not normally invest substantially into machines, equipment as well as administrative manpower. Along with the growth of service scale, businesses will invest more in machines and administrating resources, in order to both serve customers and meet the State's requirements so that they can apply for a license.

Classification of controversial services

The issue of categorizing services for licensing procedures is also a major policy debate during drafting process of relevant legal documents. Since these services are relatively new, business forms are not yet fully defined and are subject to change, state agencies face difficulties in classifying services. Some specific cases are as follows:

- *Transport connection service (ride – hailing applications)*: the debate about the type of service transport connections (ride - hailing application) few years ago is a typical case. Not only in Vietnam, many countries around the world are also confused in considering if the ride - hailing applications are transport business or brokers. This controversy extended the process of issuing Decree 10/2020/ND-CP on transport business for many years. Decree No.10 currently distinguishes between transport connection service and transport service through the concepts of "direct vehicle management, driving" and "decision on freight rate".

- *Online music and video streaming services:* the issue of classification of this service is also raised during the drafting of Decree 06 on management, provision and use of radio and television services. Some opinions suggest that websites and applications that allow listening to music, listening to audio files, watching movies, watching videos (provided by the site's administrator, not by the user) be considered radio and television services on the internet, within the scope of Decree 06 on radio and television. Some other opinions believe that this is an online content service, within the scope of Decree 72 on the management, provision and use of Internet services and online information. There is also an opinion that, for film content, it should be considered a film dissemination service under the Cinematography Law.
- *E-commerce trading floor and social network services:* E-commerce trading floors have their own regulations in Decree 52/2013/ND-CP on e-commerce. However, according to the concept of social network in Decree 72, social networks are websites and applications that allow users to actively post content and share them with other users, e-commerce trading floors can be seen as a social network with commercially focused content. In addition, many social networks today are also invading the e-commerce field by opening more functions to help users post commercial information. This is an issue to be clearly addressed during revising process of Decrees 72 and 52.

The above examples show that the promulgation of regulations on services in the digital economy requires coordination among state agencies to ensure consistency, and avoid the situation that an enterprise must comply to many conflicting and overlapping regulations, which cause difficulties for business activities.

Some services probably do not need to be governed by business conditions, licenses, or registration

During the enterprise survey, the research team found that it is seemingly unreasonable to govern some services through business condition and license.

- *Online video gaming services:* Decree 72 currently requires businesses providing online games to meet business investment conditions and apply for a license. Businesses recommend that it is unnecessary to license each enterprise. State agencies only need to manage the content of the game, not the game supplier.
- *E-commerce website services:* currently, e-commerce websites still have to register with the Ministry of Industry and Trade in accordance with Decree 52. Many opinions say that this procedure is not necessary, and can be considered gradually abolishing. E-commerce exchanges that do not have online ordering function presently still have to apply for permission under Decree 52. Some opinions of businesses also suggest simplifying this procedure by making a registration or notice.

In the drafting process of Decree 72 on online information and Decree 52 on e-commerce, the drafting agencies have proposed to simplify some of the above administrative procedures. However, the level of abolishment and simplification of administrative procedures needs to be further strengthened.

Services that need to be governed by business conditions

On the other hand, number of services that are currently under consideration and may eventually be governed by business conditions include issuance services, virtual money trading and P2P lending services. However, since these services are still very new, it seems that state agencies can not immediately come up with appropriate regulations. Therefore, the trial legal mechanism (sandbox) for these services is the appropriate governance model. The State Bank of Vietnam is requesting for the Government's policy approval for development of a decree on a legal mechanism to experiment with financial technology services (fintech sandbox). This content will be analyzed in depth in the next part of the report.

INVESTMENT AND MARKET ACCESS RESTRICTIONS FOR FOREIGN INVESTORS

The problem of restricting market access for foreign investors is also a problem arised at the process of drafting legal documents related to digital economy in Vietnam. Legal aspect of this issue will be examined from three perspectives: current legal regulations; industries that need state's protection and restrictions on foreign investment; and Vietnam's international commitments.

Some current legal regulations

Currently, the pay – radio and television sector has investment limitations for foreign investors. Namely, foreign-invested enterprises wishing to do business in radio and television must seek approval from Prime Minister. This provision is feasible for radio and television services that require separate transmission infrastructure such as wave columns, cables and satellites. However, the regulation will have no effect on cross-border services that can be provided through the internet environment.

In fact, this problem has occurred. A Vietnamese enterprise with a share of foreign capital sets up a website providing digital music, digital movies and collecting payment from viewers. In case the enterprise is considered a radio and television service provider, it is not allowed to have foreign capital, unless permitted by Prime Minister. Meanwhile, cross – border services are easily provided in Vietnam without having to meet regulations on capital ownership ratio.

According to the draft decree guiding on the Investment Law, several services that can be offered on the Internet are subject to no access or conditional access, including: press activities; public opinion polls; production and distribution of cultural products; production and distribution of television programs, musical works, performances, movies; banking; advertisement; publications; measuring and mapping; education; distribution, etc.

The draft will also consider new business lines that have not yet been implemented within Vietnam's territory at the effective date of the Investment Law to be an industry that limits market access of foreign investors. This is a safe-guarding regulation for business lines that will arise in the future, especially in the digital economy - a field where new lines often appear.

The need to protect a number of economic branches

The issue of market access restriction for some services was also set out in the drafting process of several legal documents.

- In the field of payment, in the process of revising Decree 101/2012/ND-CP on non-cash payments, the issue of limiting capital ownership ratio of foreign investors has been raised. However, this proposal was rejected after discussion;
- In the field of e-commerce, during amending process of Decree 52/2013/NĐ – CP, there were proposals to limit market access to foreign investors in the field of e-commerce exchanges;
- In the field of film production, distribution and dissemination, the drafting agency was also hesitant in determining the ownership rate of foreign capital in Vietnamese film enterprises while drafting the Cinematography Law.

Thus, it can be seen that the issue of restricting foreign investment in some business lines of digital economy in Vietnam has been put on table. It should be noted that services in the digital economy are provided on the internet platform which has no national borders. Therefore, measures to restrict market access for foreign investors can only work for services that still need to be based on direct interactions such as e-commerce, or embedded services associated with parties in Vietnam such as online payment in VND. As for other services, the application of market access restriction on foreign investors may be ineffective as long as cross-border services can still be provided normally.

Vietnam's international commitments

Currently, in its international commitments Vietnam is still entitled to the right to limit market access in digital economic sectors. However, foreign enterprises have already invested a large amount of capital in Vietnamese enterprises such as e-commerce, payment intermediaries. Therefore, if Vietnam introduces regulations restricting the rate of foreign capital in these areas, it is quite similar to require foreign investors in these enterprises to resell their shares. This will lead to the risk of international investment disputes where Government of Vietnam is the defendant.

PROTECTION OF INTELLECTUAL PROPERTY FOR DIGITAL ECONOMIC DEVELOPMENT

In many other economic sectors, the largest asset value for an enterprise is a factory, equipment, facilities, etc. while in the digital economy the most valuable asset is software, data, information systems, copyrights for books, music, movies, entertainment programs, arts, etc. These are all property objects protected under the law on intellectual property. Therefore, the introduction of legal regulations and effective enforcement of intellectual property rights for above types of assets will help businesses increase their investment and gain more contracts in the digital economy.

RECOGNITION OF DIGITAL ASSETS

Vietnam's intellectual property law recognizes and protects many types of intellectual property, like copyright and relevant rights to works, software, information systems, industrial property for trade secrets. However, a number of issues have not been clarified, which causes many difficulties during implementation. For example, the concept of trade secrets in the Intellectual Property Law is still very general and difficult to understand. This leads to controversy over whether the data is considered a trade secret and how protection mechanism works. In practice, there has been data theft cases, but state agencies still hesitate to acknowledge that this type of intellectual property needs to be protected. The Intellectual Property Law is currently in the review and revision, and the recognition and protection of intellectual property in digital economy should be considered.

PROTECTION OF DIGITAL ASSETS IN CIVIL AND LABOR CONTRACTS

The issue of protecting digital assets in civil and labor contracts is a big obstacle for businesses investing in digital economy or digital transformation. Through the survey, the research team discovered a number of practices that infringe digital assets in civil and labor contracts that can hinder the development of digital economy, as follows:

Let's see the case when an organization (which can be an enterprise, a non-business unit, a state agency) performing normal activities in the offline environment wants to transform to digital business and bring business activities online. In many cases, the organization is unable to perform such task in-house, so it has to hire an IT solution provider to write programs for website, supply software or it has to purchase ready-made software packages. Several questions arose during transform process:

- Will the generated data and information belong to the service receiver or the digital conversion service provider?
- Who has the right to make use of that data and information? Who owns the value generated by this activity? How to share?
- In case of contract suspension or termination, how will this data and information be processed?
- In case of leaking data and information, how will the parties be responsible?

If parties have a clear agreement on these encounters specified in their contract, conflicts arising in practice can be avoided and digital transformation process can be facilitated smoothly. However, in many cases, digital conversion contracts do not clarify these issues, therefore disputes arise. These events will create hesitation for many businesses, state agencies, and professional units in the digital transformation process. According to some lawyers participating in the survey of the research team, opinion of the court system on data ownership and information is still unclear.

In the current labor contracts, the information confidentiality terms are still controversial. Businesses in the digital economy will normally have a number of key personnel that have access to important company information, software and data. To ensure these people keep confidentiality, companies will often include non-disclose agreement (NDA) and non-compete agreement (NCA) covering post-contract period. As such, employees are not allowed to disclose company's confidential information and cannot work for a competing business for a period of time after the termination of the contract.

Non-disclosure agreements receive the consent of the court system and businesses can rely on them to enforce contracts. However, on non-competitive agreements, there are still two streams of opinion. Some courts consent to the agreement and consider it in line with labor laws. However, there are some courts that disagree and consider this agreement violate workers' freedom of labor and, therefore, void. There is a risk that many trade secrets of technology businesses can be accessed and used by the competitor if the employee works for those companies. This is an issue that the judicial system needs to have a clear perspective on so that businesses and employees can feel secure in doing business in technology sector.

PROTECT DIGITAL ASSETS BY CRIMINAL LAW

Criminal law can also be considered a good tool to protect digital assets, helping businesses feel secure to invest. The Criminal Code of Vietnam has currently identified offences with many violations affecting the development of the digital economy such as Offence of infringement of copyright, relevant rights; Offence of manufacturing, buying, selling, exchanging or giving tools, equipment or software for illegal use; Offence of spreading informatics programs harmful to computer networks, telecommunications networks, electronic devices; Offence of obstructing or disrupting the operation of computer networks, telecommunications networks or electronic devices; Offence of illegally uploading or using information on computer networks or telecommunications networks; Offence of illegally breaking into computer networks, telecommunications networks or electronic devices of other people; Offence of illegally collecting, storing, exchanging, trading, disclosing information on bank account; Offence of using computer networks, telecommunications networks or electronic means of appropriating property.

Data breaches are not currently covered under the Offence of Industrial Property Infringement (although the data could be considered a trade secret, a form of industrial property), but regulated under Offence of illegally giving or using information on computer networks or telecommunications networks with acts of buying, selling, exchanging, donating, modifying, changing or publicizing legal private information of agencies, organizations or individuals information on the computer network or telecommunications network without the permission of the owner of such information and the offence of illegally collecting, storing, exchanging, trading, and publicizing information on bank account.

However, in reality, although the violations are relatively popular, the number of cases handled is almost none. The research team has searched on public website where the judgments of People's Courts at all levels are posted, the number of criminal cases for these acts is very small. The behaviors are regularly sanctioned such as appropriation of money in bank accounts and credit cards, fraud in e-commerce, providing wiretapping and tracking software. There have been no actual cases of data breaches or information systems breaches.

CENSORSHIP OF INFORMATION CONTENT IN THE INTERNET ENVIRONMENT

The problem of malicious information appearing in the internet environment is a great concern of Vietnam's state agencies. Therefore, many policies, regulations and measures have been introduced by state agencies to combat this issue. These regulations form an important part of the policy framework that businesses in the digital economy in Vietnam should pay attention to.

THE CONTENT OF INFORMATION SHALL BE REMOVED

Legal normative documents in the digital economy always contain provisions on information contents that need to be removed from or restrict access to on the Internet, such as Article 12 of the 2006 Law on Information Technology, Article 9 of Press Law 2016, Article 5 of Decree 72 on online information, Article 8 of the Law on Advertising, Article 8 of the Law on Cyber Security, Article 10 of the Law on Cinematography, etc.

Eliminated information is divided into two relatively explicit groups: commercial information and non-commercial information. For commercial information, in addition to regulation on meeting the general requirements on information censorship, it must also meet specific regulations on the field of commerce and advertising such as prohibit advertisement of tobacco, strong alcohol, and food for children, goods and services banned from business, etc. Non-commercial information must only meet the criteria of general security such as anti Communist Party and State information, information that is contrary to traditional customs, fake news, insulting, defamation, etc.

Eliminated information can also be divided into main groups:

- *Information infringing on public interests*: information against the Communist Party, the State, national hatred, pornography, violence, and state secrets;
- *Information prohibited for children*: the information which is not appropriate for the development of children;
- *Information infringing interests of individuals and organizations*: information that offends individuals, organizations, privacy secrets, intellectual property rights;
- *Fake information*: false information.

Most of the enterprises participated in the interview of the research team agreed that there will be a ban on certain information content online. However, businesses face many difficulties in implementing these regulations because they are too general and unclear. In many cases, enterprises are not able to determine which information is contrary to traditional customs, information that is violent, pornographic, and which information is fake. In many cases, even the enterprises do not know which goods and services are not allowed to be sold online such as sex toys, sports weapons, etc.

MECHANISM CENSOR CONTENT, PRE-CHECK AND POST-CHECK

In order to eliminate above information, there are different pre-check and post-check mechanisms, from the corporate side and also from government side. Debating whether to apply pre-check or post-check is also a big issue. Pre-check means that state agencies and enterprises apply measures to remove information before being posted on the network. Post-inspection is the permission for information to be posted in advance, and be removed afterwards in case of error.

For example, the issue of pre-check or post-check on film content and online videos is the focus of policy discussion when revising the Cinematography Law as well as Decree 06 on television.

The pre-check regulation requires movies to be assessed by a government agency or a television station for their content before being disseminated to viewers over the internet. On the contrary, the post-check mechanism allows enterprises to disseminate films first. If there are mistakes, they then will be asked to remove them.

The Draft of cinematography law currently applies a pre-check mechanism to movies. Draft of Decree 06 applies the pre-check mechanism to films and videos with political, news and current content; while for other contents (such as music, art performance, game show, sport, etc.), post-check mechanism will be applied.

For content posted on social networks, Decree 72/2013/ND-CP requires businesses to have filters to remove infringing information, but there are no more detailed provisions on this filter. Most information on social networks still applies post-check when requested by state agencies. For information posted on e-commerce trading floors, the law does not require enterprises to pre-check content. However, in reality, businesses have keyword filters to remove items that are not allowed to be sold on the Internet or images, content that violate the law.

For online electronic games, the content pre-check mechanism still applies. However, many people believe that it is entirely possible to switch to post-check mechanism for these contents when amending Decree 72/2013/ND-CP on governance, provision, use of internet services and online information.

News articles may be published only when edited by Vietnam press agency. General-content websites are only permitted to republish information published by Vietnamese press agencies. Other websites are only allowed to publish specialized information, information of specific agencies, organizations, businesses and individuals and must not provide generalized information.

When applying post-check measures, state agencies will require businesses that own websites, social networks, applications or individuals themselves using social networks to remove violated content. Legal documents in all fields have regulations on the management of websites, social networks, and applications to remove information upon request from state agencies. However, enterprises expressed that the application of this regulation is troublesome in many cases, such as businesses do not know which agency had the authority to request content removal. The matter of the procedural sequence of requesting removal of content such as if written request is required, required form of request, timeframe for business to respond, etc. is also unclear.

At present, besides requesting information removal, some internet service providers have mechanism for correcting and explaining for fake information. This is a measure that should be studied, applied and included in legal documents by Vietnam's state agencies. Accordingly, in many cases, instead of requesting to remove information that is not known whether it is true or false, state agencies can request platforms to provide corrections and explanations to accompany that information.

Moreover, at present, in order to block prohibited information, in addition to requiring organization in charge of information systems to remove, Vietnam's state agencies can also use measures such as withdraw or revoke domain name (if it is Vietnamese domain name) or request telecommunications service providers to block access to the domain name or server. These are perfectly appropriate measures to prevent prohibited information under Vietnam's law.

User's education is essential to build up a healthy cyber ecosystem. The Ministry of Information and Communications is in the process of developing a Code of Conduct in Cyber space and has submitted to the government a proposal on Children Safety in the Internet. More initiatives by government authorities including the Ministry of Education and Training, Ministry of Labor, War Invalid and Social Affairs and related associations will be essential. The private sector - technology and education companies, local and international, has an important role to play to educate their users, and should be encouraged.

PROTECTION OF USER'S DATA

Effective user's data protection will make users feel secure while resort to services in the digital economy, and thereby facilitate digital economy. On the contrary, if users are worried that their information might be leaked or used for unforeseen purposes, they will refuse the service, thereby slowing down digital economic development. Protection of user's data is also one of the central policies of governing digital economy. Vietnamese lawmakers are also working hard to come up with appropriate legal regulations on user data protection.

GATHER INFORMATION AND AUTHENTICATE USERS

Most of the legal documents of Vietnam in the field of information technology have regulations on user's data protection. The most basic principles which have been included in the Law on Information Technology since 2006 are: (1) to collect personal information only with the consent of that individual; (2) only use the personal information collected for the consented purpose; (3) measures must be taken to ensure information is secured; (4) prohibit providing user's data to other individuals or groups. However, the implementation of these regulations still faces many difficulties.

The Law on Network Information Security has dedicated a section to regulate the protection of personal information on the internet. The principles of personal data protection are not much different from the Law on Information Technology, but with additional enforcement measures. The Law on Information Technology only provides a guarantee that individuals have the right to claim compensation when the person holding personal data violates above obligations. Besides, Law on Network Information Security adds more measures to inspect, examine and sanction administrative violations of state agencies.

Currently, the Ministry of Public Security is proposing to the Government to make a separate Decree on Personal Data Protection. This Decree is expected to be a comprehensive legal framework on the protection of personal data in the current internet environment.

AUTHENTICATE USERS

In terms of user authentication, Vietnamese law currently only requires mandatory authentication for services related to financial transactions, payments, electronic signatures and for sellers on e-commerce trading exchanges. For other services, such as social networks, Decree 72 only requires authentication via email or phone number, but there are no stronger measures.

In banking transactions, the Law on Anti-Money Laundering still requires that the authentication of users must be in the form of face-to-face. Electronic Know Your Customer (eKYC) have been successfully tested but yet widely applied.

Some comments suggest that social media users must use real names. This proposal has not made clear if social networks will have to strengthen user authentication measure; or state agencies shall prosecute individuals using fake names on social networks. In world practice, some social networks have tried requiring clients to use real names, but such attempts failed.

In e-commerce, user authentication regulations have stricter application on sellers. Accordingly, the seller must declare contact information so that users can contact when there is a dispute or problem arises from the transaction. The law also requires e-commerce trading floors to authenticate these information, but does not specify the form of authentication.

According to the opinion of enterprises participating in the survey, user authentication will be more effective if there is support from state agencies that manage residential databases and corporate databases.

STORING AND UTILIZING USER'S DATA

Balancing the protection and use of user data is also a topic of policy debate during drafting process of relevant laws. This debate is not limited to the utilization of data held by enterprises only, but also to data held by state agencies.

One established principle is that the utilization of personal data to provide it to third parties should not disclose or potentially reveal the user's identity. In other words, information that identifies a particular person or information that can be used to determine a particular individual is protected. The rest is available to utilize, use and provide to third parties.

As mentioned above, Vietnamese law has regulation on prohibiting the sale of user data, which is enforced by civil, administrative and criminal measures. However, it is not clear whether personal data is a trade secret, a form of intellectual property protected under the intellectual property law.

In 2020, the MIC also issued a Decree 91/2020/ND-CP on fighting spam messages, spam emails and spam calls. The Decree requested stronger measures to prevent spam messages, spam emails and spam calls by identifying responsibilities of network providers in filtering telephone numbers. This measure will also contribute to reducing the purchase and sale of personal information, using personal information for the purposes without the consent of the owners.

Laws in the e-commerce field have stronger regulations where there are provisions that sanction e-commerce websites in case of designing default mode without giving users the right to choose, or share information when doing online transactions.

PROVIDE INFORMATION TO STATE AGENCIES

The issue of platforms having to provide user information to public authorities is also an important policy debate. This is an important issue, but it seems not to be implicit in the legal provisions. It should be clearly recognized that the access to personal information by state agencies on platforms will greatly affect the development of the digital economy. Platform users are hesitant that their personal information might be leaked or disclosed, and will prioritize the choice of platforms with higher security, including confidentiality against government requests. If Vietnamese state agencies have too much authority to require domestic service providers to disclose user information, without having same requirement upon foreign service providers, then there is a motivation for Vietnamese users to prefer using cross-border service providers.

Many legal normative documents often state a very general provision "providing information to the competent state agency", but in few cases stipulate clearer guidance (Point a, clause 2, Article 26 of Cyber Security Law, clause 2 Article 12 and point c clause 1 Article 17 of Cyber Security Law, point c clause 7 Article 21 and clause 7 Article 25 of Decree 72/2013/ND-CP, clause 6 Article 27 of Decree 52/2013/ND-CP). In practice, businesses have many difficulties in complying with this regulation. In the survey, enterprises reflect that government officials at different levels making requests for information by written requests, but there have been also cases of verbal ones. This makes businesses confused as when they have to meet the requirements, and when they can refuse.

Currently, only the law on banking information has a relatively clear and complete regulation on providing personal information to state agencies upon request according to Decree 117/2018/ND-CP on keeping confidentiality and providing information on customers of foreign credit institutions, bank branches. This Decree clearly defines which cases request providing information, who has the right to execute written request for providing information, how officials who come to access information can authenticate, and how to protect information after disclosure.

Disclosure of user's data upon state agencies' request shall be balanced between protection of users' privacy and business property on one hand, and the need for criminal and legal breaches prevention by state agencies on the other. Currently, such issue is not yet clearly addressed in legal normative documents. Some documents such as Criminal Law approach from perspective of upholding privacy. For example, Article 12 of Criminal Law stipulates that "Search of accommodation; search, seizure and seizure of mails, telephones, telegrams, electronic data and other forms of private information exchange must comply with the provisions of this Code." Articles 223 to 228 of this Code also stipulates on special criminal investigation procedure methods including "collection of secret digital data" applies only to certain criminal cases and decision-making at the high level. However, many other legal document upholds state governance and requests very broad data provision. For example, Decree 25/2013/ND-CP requires providing information to all agencies that are competent of revision, inspection and handling of e-commerce violations.

MECHANISM OF TESTING FINANCIAL TECHNOLOGY

In order to deal with the fact that many business service models in the digital economy are developing so fast, but regulators cannot keep up with appropriate measures, many countries have introduced a pilot policy mechanism (regulatory sandbox). Vietnamese policy advisory agencies have also begun to have the idea of introducing a similar mechanism for fintech services.

Based on reality that many activities in the monetary, banking, and financial sectors are currently prohibited or subject to very demanding conditions before being allowed to execute, current regulations are not suitable to new business models that explore internet applications and information technology. However, even if state agencies are required to issue regulations for a new business model, they cannot do it immediately.

To resolve this contradiction, the pilot mechanism is one solution. The basic principle of this mechanism is that the State respects the right to do business, but needs to control the risks that affect public interests. Therefore, instead of state agencies issuing regulations and measures that oblige enterprises to take to protect the public interests, enterprises can themselves propose these measures.

Businesses shall prepare a proposal for approval from state agency. The proposal shall outline business plan, legal issues affecting such business intentions, and measures proposed by enterprise to protect public interests in finance sector such as anti-fraud, anti-money laundering, property appropriation, etc. State agencies shall appraise and consider approval of business plan with accompanying measures to protect public interests.

This scheme is expected to pave the way for a number of current financial activities such as peer-to-peer lending, e-user authentication, cryptocurrency and possibly more models.

TAX

Tax management for the digital economy sector is also currently a matter of much debate policy. Two biggest problems raised are (1) collection of value-added tax and corporate income tax of individuals and organizations selling goods and services on platforms; and (2) collect contractor tax on services provided across borders.

COLLECT SALES TAX ON PRODUCTS ON PLATFORMS

Under the provisions of tax laws, individuals, organizations selling goods and services regardless of the direct sale or through electronic means will be subject to tax liability. Individuals and households that sell goods directly to customers often have to have shops, signboards at convenient locations to attract customers. In these case, regional tax officials often come in person, request and guide business owners to declare and pay taxes. In many cases, businesses can enjoy the convenient lump sum tax scheme.

However, in online sales and business activities, individuals and business households do not need to open a store in convenient places, but may only need a warehouse in a place that is difficult to see. This makes it difficult to grasp information about the business establishments for local tax officers. In addition, determination of the presumptive tax for the establishments selling on social networks is difficult when applying current measures.

Decree 126/2020/ND-CP guiding the Law on Tax Administration has recently introduced measures to manage tax in this case. Accordingly, the banks will be the party that provides information to the tax authorities about the accounts of the same sales person and transactions of that account in the case of inspection and examination. This will help tax authority to identify the seller's transaction and to proceed with accurate determination of the tax liability. However, there have been many concerns that such regulation will lead to customers' data leak at banks.

One more issues has been raised: determination of value added tax liabilities of individuals trading on platforms. Since 2017, Department General of Taxation issued a document No. 384/TCT-TNCN of February 8, 2017 allowing individuals operating in platform-based two-wheels transportation sector to pay taxes directly at the rate of 3% on gross sales (instead of deducting 10% on added value). However, Decree 126/2020/ND-CP requested transport-hailing applications to declare and pay value-added tax based on total sales generated from cooperation with two-wheels transporters at the rate of 10%. This seems not to be suitable to the nature of application based two-wheels transportation activities.

CONTRACTOR TAX ON CROSS-BORDER SERVICES

Traditional method of tax collection for cross-border services is that a service user in Vietnam will have to declare and pay tax on behalf of an overseas service provider. In the past, customers using cross-border services were often businesses, so it was possible for tax authorities to require businesses to declare and pay taxes on behalf of contractors. However, when advertising revenue of social networks comes from small-scale individuals, households, such tax administration is no longer appropriate. These individuals and households often apply presumptive tax and are not required to make year-end tax finalization, therefore, there will be no basis to ask them to declare and pay taxes on behalf of foreign contractors.

To handle this problem, Decree 126/2020/ND-CP requires cross-border service providers to proactively declare and pay taxes on revenue generated from Vietnam. If the cross-border service provider does not do this, banks and payers will have to proactively deduct tax on payment transactions for that provider. While waiting for the OECD countries to come up with a commonly agreed framework on taxing cross-border digital services, it's important that Vietnam ensures new tax regulations follow the principles of simplicity and compliance efficiency, at the same time avoids potential double taxation to balance revenue collection and stimulate growth of digital economy.

04

ASSESSMENT OF DRAFTING AGENCIES' REFLECTION

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The VCCI has an annual assessment of reflection to check the receptiveness of drafting agencies to VCCI's comments on legal documents issued within the year. The assessment's results are hoped to make all the effort and success of the enterprise community in participation of policy making process been recognized.

LEGAL DOCUMENTS COMMENTED BY THE VCCI

By mid of December 2020¹⁰, 77 legal documents with VCCI's commentary have been issued, including 07 laws, 44 decrees and 22 circulars.

07 LAWS

- Law on Mediation, Dialogue at Court of the National Assembly, No. 58/2020/QH14 dated June 16, 2020;
- Law on Enterprises of the National Assembly, No. 59/2020/QH14 dated June 17, 2020;
- Law amending and supplementing a number of articles of the Law on Natural Disaster Prevention and Law on Dykes of the National Assembly, No. 60/2020/QH14 dated 17/6/2020;
- Law on Investment of the National Assembly, No. 61/2020/QH14 dated June 17, 2020;
- Law amending and supplementing a number of articles of the Construction Law of the National Assembly, No. 62/2020/QH14 dated June 17, 2020;
- Law amending and supplementing a number of articles of Law on Promulgation of Legal Documents of the National Assembly, No. 63/2020/QH14 dated June 18, 2020;
- Law on Investment under the Public-Private Partnership of the National Assembly, No. 64/2020/QH14 dated June 18, 2020.

¹⁰ Assessed documents were issued between Jan 01, 2020 and the mid of December, 2020

44 DECREES

- Decree No.10/2020/ND-CP dated January 17, 2020 of the Government regulating the auto transport business and auto transport business conditions.
- Decree No.13/2020/ND-CP dated January 21, 2020 of the Government on elaboration of the Law on Animal Husbandry.
- Decree No.15/2020/ND-CP dated February 03, 2020 of the Government regulating penalties for administrative violations against regulations on postal services, telecommunications, radio frequencies, information technology and electronic transactions.
- Decree No.17/2020/ND-CP dated February 05, 2020 of the Government on amendments to some Articles of Decrees related to necessary business conditions in fields under the management of the Ministry of Industry and Trade.
- Decree No.22/2020/ND-CP dated February 24, 2020 of the Government on amendments to Government's Decree No. 139/2016/ND-CP dated October 04, 2016 on license fees.
- Decree No.23/2020/ND-CP dated February 24, 2020 of the Government regulating the management of river bed sand and gravel and protection of river beds, banks and terraces.
- Decree No.35/2020/ND-CP dated March 24, 2020 of the Government elaborating on several Articles of the Competition Law.
- Decree No.36/2020/ND-CP dated March 24, 2020 On Penalties for Administrative Violations against Regulations on Water Resources and Minerals.
- Decree No.39/2020/ND-CP dated April 03, 2020 of the Government on promulgating the Special Preferential Import Tariff of Vietnam to implement the Trade Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Cuba in the period of 2020 - 2023.
- Decree No.41/2020/ND-CP dated April 08, 2020 of the Government on the extension of time limit for tax and land rental payment.
- Decree No.42/2020/ND-CP dated April 08, 2020 of the Government on providing the List of dangerous goods and the transport of dangerous goods by land motor vehicles and the transport of dangerous goods on inland waterways.
- Decree No.44/2020/ND-CP dated April 08, 2020 of the Government on enforcement of judgment enforcement against commercial legal entities.
- Decree No.47/2020/ND-CP dated April 09, 2020 of the Government on management, connection and share of digital data of state agencies.

- › Decree No.48/2020/ND-CP dated April 15, 2020 of the Government amending a number of Articles of Decree No. 38/2016/ND-CP elaborating a number of Articles of the Law on Hydrometeorology.
- › Decree No.52/2020/ND-CP dated April 27, 2020 of the Government on golf course investment and business.
- › Decree No.53/2020/ND-CP dated May 05, 2020 of the Government regulating environmental protection fees for wastewater.
- › Decree No.55/2020/ND-CP dated May 22, 2020 of the Government elaborating a number of articles of the Law on Execution of Criminal Judgments regarding judgment execution against commercial legal persons.
- › Decree No. 57/2020/ND-CP dated May 25, 2020 of the Government amending and supplementing a number of articles of the Government's Decree No. 122/2016/ND-CP of September 01, 2016, on the Export Tariff, the Preferential Import Tariff and the list of commodity items and their specific duty rates, compound duty rates and out-of-quota import duty rates, and Decree No. 125/2017/ND-CP of November 16, 2017, amending and supplementing a number of articles of Decree No. 122/2016/ND-CP
- › Decree No. 67/2020/ND-CP date June 15, 2020 of the Government amending and supplementing a number of articles of the Government's Decree No. 68/2016/ND-CP of July 01, 2016, prescribing conditions on trading of duty-free goods, operation of warehouses, storing yards, and places for customs clearance, goods gathering and customs inspection and supervision.
- › Decree No. 68/2020/ND-CP dated June 24, 2020 on providing amendments to Clause 3 Article 8 of the Government's Decree No. 20/2017/ND-CP prescribing tax administration for enterprises having associated transactions.
- › Decree No. 81/2020/ND-CP dated July 09, 2020 amending Decree No. 163/2018/ND-CP dated December 04, 2018 on issuance of corporate bonds.
- › Decree No. 82/2020/ND-CP dated July 15, 2020 of the Government regulating the sanctioning of Administrative Violations in the field of Judicial Assistance; Judicial Administration; Marriage and Family; Civil Enforcement; Bankruptcy of Enterprises and Cooperatives.
- › Decree No. 85/2020/ND-CP dated July 17, 2020 of the Government elaborating a number of articles of the Law on Architecture
- › Decree No. 86/2020/ND-CP dated July 23, 2020 of the Government on amendments to Government's Decree No. 171/2016/ND-CP dated December 27, 2016 on registration, deregistration, sale and purchase, and building of ships
- › Decree No. 91/2020/ND-CP dated August 14, 2020 of the Government against spam messages, spam emails, spam calls

- › Decree No. 95/2020/ND-CP dated August 24, 2020 of the Government guiding implementation of procurement bidding under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership
- › Decree No. 97/2020/ND-CP dated August 26, 2020 of the Government on increasing the limit of carrier's liability for damages in air transportation.
- › Decree No. 98/2020/ND-CP dated August 26, 2020 of the Government stipulating the sanctioning of administrative violations in commercial activities and the production of and trading in counterfeit goods, banned goods and protection of consumers' interests.
- › Decree No. 99/2020/ND-CP dated August 26, 2020 of the Government regulating the sanctioning of administrative violations in the fields of oil and gas, trading in petroleum and gas.
- › Decree No. 102/2020/ND-CP dated September 01, 2020 of the Government regulating Vietnam Timber Legality Assurance System.
- › Decree No. 103/2020/ND-CP dated September 04, 2020 of the Government regulating the certification of fragrant rice varieties exported to the European Union.
- › Decree No. 111/2020/ND-CP dated September 18, 2020 of the Government promulgating the Preferential Export Tariff and Special Preferential Import Tariff of Vietnam to implement the Free Trade Agreement between the Socialist Republic of Vietnam and the European Union for the period 2020 - 2022.
- › Decree No. 114/2020/ND-CP dated September 25, 2020 of the Government elaborating the implementation of Resolution No. 116/2020/QH14 of the National Assembly on reduction of corporate income tax payable by 2020 for enterprises and cooperatives, other non-business units and organizations.
- › Decree No. 117/2020/ND-CP dated September 28, 2020 of the Government regulating the sanctioning of administrative violations in the health sector.
- › Decree No. 118/2020/ND-CP dated October 02, 2020 of the Government amending and supplementing a number of articles of Decree No. 69/2010/ND-CP dated June 21, 2010 of the Government on bio-safety of genetically modified organisms, genetic specimens and products of genetically modified organisms
- › Decree No. 119/2020/ND-CP dated October 07, 2020 of the Government regulating the sanctioning of administrative violations in press activities and publishing activities.
- › Decree No. 122/2020/ND-CP dated October 15, 2020 of the Government on single-window cooperation in processing applications for registration of enterprises, branches, representative offices; employee declaration; social insurance participant number; use of invoices by enterprises

- › Decree No. 123/2020/ND-CP dated October 19, 2020 of the Government regulating Invoices and Documents
- › Decree No. 125/2020/ND-CP dated October 19, 2020 of the Government regulating the sanctioning of administrative violations of taxes and invoices.
- › Decree No. 126/2020/ND-CP dated October 19, 2020 of the Government elaborating a number of articles of the Law on Tax Administration.
- › Decree No. 128/2020/ND-CP dated October 19, 2020 of the Government regulating the sanctioning of administrative violations in the customs field.
- › Decree No. 131/2020/ND-CP dated November 02, 2020 of the Government providing for Clinical Pharmacology Organization and Operations in Healthcare Establishments.
- › Decree No. 132/2020/ND-CP dated November 05, 2020 of the Government on tax administration applicable to enterprises with related party transactions
- › Decree No. 136/2020/ND-CP dated November 24, 2020 of the Government elaborating a number of articles and measures to implement the Law on Fire Prevention and Fighting and the Law amending and supplementing a number of articles of the Law on Fire Prevention and Fighting.

22 CIRCULARS

MINISTRY OF INDUSTRY AND TRADE

- › Circular No. 21/2020/TT-BCT of the Minister of Industry and Trade dated September 09, 2020 regulating the order and procedures for electricity activities licensing.
- › Circular No. 25/2020 / TT-BCT of the Minister of Industry and Trade dated September 29, 2020 on Planning for economical and efficient use of energy and Reports on implementation thereof; Implementation of energy accounting.

MINISTRY OF TRANSPORT

- › Circular No. 06/2020/TT-BGTVT of the Minister of Transport dated March 09, 2020 amending and supplementing a number of articles of the Circular No. 03/2017/TT-BGTVT dated January 20, 2017 of the Minister of Transport stipulating the content and training program for crew members and drivers of inland watercraft;
- › Circular No. 12/2020/TT-BGTVT of the Minister of Transport dated May 29, 2020 regulating the organization and management of auto transportation and land transport support services;
- › Circular No. 22/2020/TT-BGTVT of the Minister of Transport dated September 28, 2020 regulating the management of fuel consumption and CO2 emissions of aircrafts in civil aviation operations.

MINISTRY OF SCIENCE AND TECHNOLOGY

- › Circular No. 04/2020/TT-BKHCH of the Minister of Science and Technology dated September 28, 2020 amending and supplementing a number of articles of Circular No. 32/2011/TT-BKHCH dated November 15, 2011 of the Minister of Science and Technology defining criteria for hi-tech application projects, investment projects to manufacture hi-tech products, and appraisal of application of dossiers for certificates of hi-tech application activities, newly established enterprises in projects producing hi-tech products and high-tech enterprises.

MINISTRY OF AGRICULTURE AND RURAL DEVELOPMENT

- › Circular No. 09/2020/TT-BNNPTNT of the Minister of Agriculture and Rural development dated June 30, 2020 guiding the certification of natural disasters and epidemics in the implementation of agricultural insurance supporting policy.

MINISTRY OF FINANCE

- Circular No. 64/2020/TT-BTC of the Minister of Finance dated July 08, 2020 on providing for fees in the medical sector;
- Circular No. 65/2020/TT-BTC of the Minister of Finance dated July 09, 2020 on amendments to the circular No. 302/2016/TT-BTC on guidelines for license tax;
- Circular No. 69/2020 /TT-BTC of the Minister of Finance dated July 15, 2020 on applications and procedures for debt settlement in accordance with Resolution No. 94/2019/QH14 dated November 26, 2019 of the National Assembly.
- Circular No. 77/2020/TT-BTC of the Minister of Finance dated August 14, 2020 providing guidance on the Government's Decree No. 81/2020/ND-CP dated July 9, 2020 on amendments to the Government's Decree No. 163/2018/ND-CP dated December 4, 2018 on issuance of corporate bonds;
- Circular No. 85/2020/TT-BTC of the Minister of Finance dated October 01, 2020 regulating the management and use of funds for the operation of the Central Steering Committee for Natural Disaster Prevention and Control, and the Steering Committees for Natural Disaster Prevention and Control at all levels.

MINISTRY OF INFORMATION AND COMMUNICATIONS

- Circular No. 07/2020/TT-BTTTT of the Minister of Information and Communications dated April 13, 2020 regulating the inspection of telecommunications equipments and radio stations;
- Circular No. 10/2020/TT-BTTTT of the Minister of Information and Communication dated May 07, 2020 amending and supplementing a number of contents of the Circular No. 30/2011/TT-BTTTT dated October 31, 2011 of the Minister of Information and Communication on certification and submission of declarations of conformity of information technology and communications commodities;
- Circular No. 13/2020/TT-BTTTT of the Minister of Information and Communications dated July 03, 2020 on identification of software production satisfying the process;
- Circular No. 18/2020/TT-BTTTT of the Minister of Information and Communications dated August 20, 2020 on planning 2300-2400 MHz and 2500-2690 MHz bands for Vietnam's IMT mobile communication system.
- Circular No. 21/2020/TT-BTTTT of the Minister of Information and Communications dated September 07, 2020 regulating the issuance of certificates of free sale for commodities in the information and communication sector.

STATE BANK OF VIETNAM

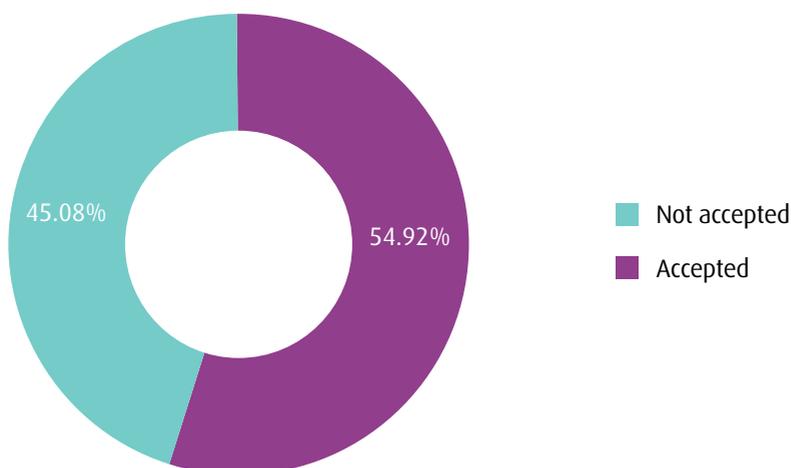
- Circular No. 01/2020/TT-NHNN of the Governor of the State Bank of Vietnam dated March 13, 2020 on debt rescheduling, exemption or reduction of interest and fees, retention of debt category to assist borrowers affected by covid-19 pandemic.
- Circular No. 02/2020/TT-NHNN of the Governor of the State Bank of Vietnam March 30, 2020 guiding payment and money transfer activities concerning border-gate transfer of goods.
- Circular No. 09/2020/TT-NHNN of the Governor of the State Bank of Vietnam dated October 21, 2020 regulating information system security in banking operations.
- Circular No. 10/2020/TT-NHNN of the Governor of the State Bank of Vietnam dated November 02, 2020 amending and supplementing a number of articles of Circular 28/2015/TT-NHNN dated December 18, 2015 of the Governor of the State Bank Vietnam providing for the management and use of digital signatures, digital certificates and digital signature authentication service of the State Bank
- Circular No. 13/2020/TT-NHNN of the Governor of the State Bank of Vietnam dated November 13, 2020 amending and supplementing a number of articles of the Circular No. 22/2018/TT-NHNN dated September 5, 2018 of the Governor of the State Bank of Vietnam guiding on procedures and dossiers for approval of the provisional list of personnel of commercial banks, non-bank credit institutions and foreign bank branches.

ASSESSMENT OF RECEPTIVENESS

In the above-mentioned 73 LNDs, VCCI has given 386 comments, corresponding to more than 05 proposals and recommendations to each legal document.

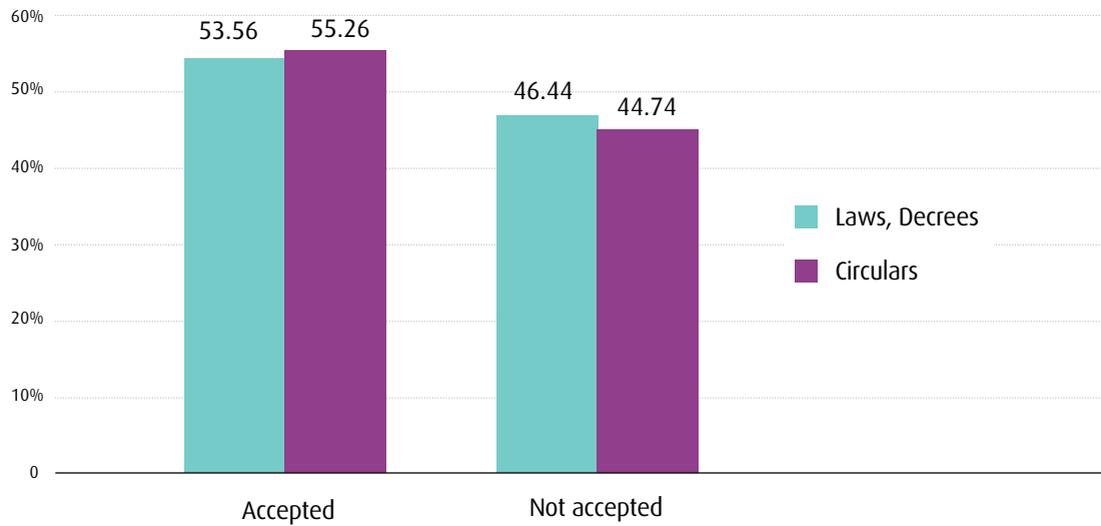
The rate of the VCCI's comments accepted by ministries and State Agencies in 2020 is 54.92% (212/386 comments). This rate has steadily increased over the past three years and this year's rate is obviously higher than that of the previous two years (44.08% in 2019 and 42.51% in 2018) in particular. The higher rate of comment acceptance rather than the rate of refusal shows that the opinions of the business community are more seriously taken for considerations by State Agencies, which also shows the progressive spirit of policy-makers.

Figure 2. Rate of VCCI's comments accepted



Considering types of documents, the rate of acceptance for comments on draft circulars is higher than that for bills and draft decrees with a slight difference.

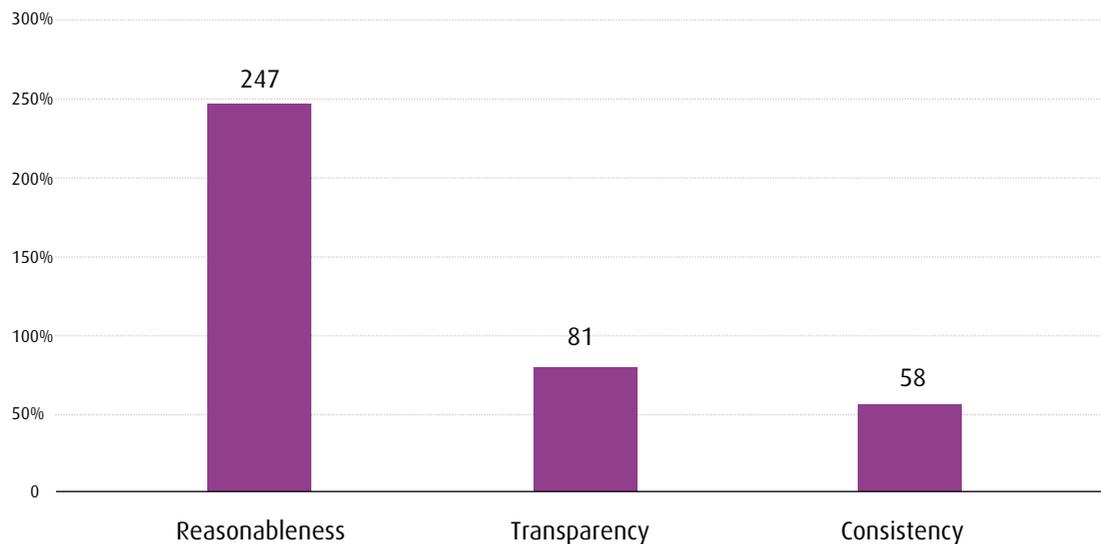
Figure 3. Rate of comments accepted among different types of documents



NUMBER OF COMMENTS CATEGORIZED BY COMMENT CRITERIA

The number of comments related to the reasonableness accounts for the largest proportion with 64% of the total number of comments, followed by comments on transparency and consistency. Similar to previous years, recommendations related to the reasonableness has always been the majority amongst the comments of VCCI. This shows that, from the perspective of the business community, at the time of drafting laws on business, there are still many points of unreasonable, infeasible, and unfavorable conditions for enterprises.

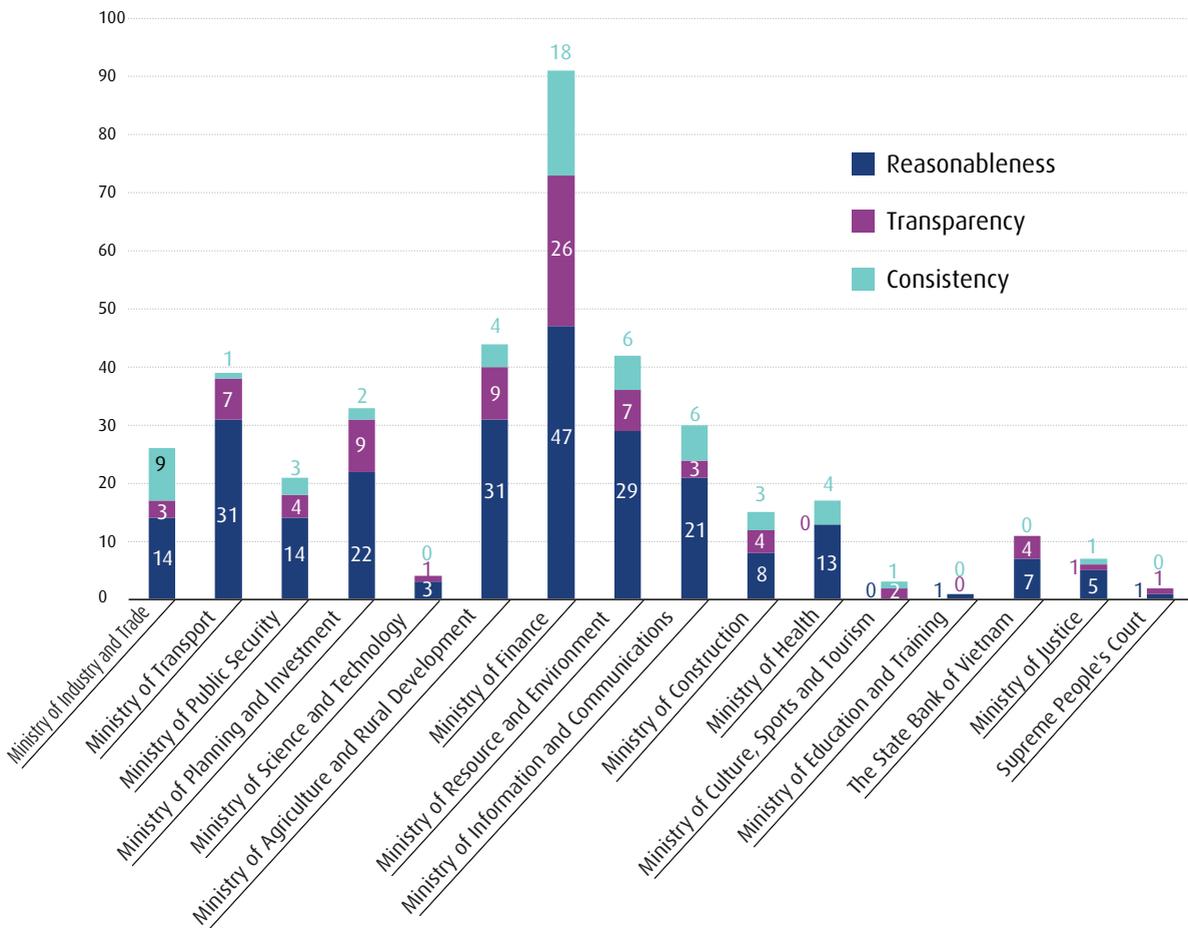
Figure 4. Number of comments categorized by criteria



The proportion of comments related to transparency tends to decrease, and decreases sharply in 2020 (from 28.6% in 2018 and 27.2% in 2019 to 20.9%). This shows that provisions of laws have been designed in a clearer and more specific manner by drafting agencies.

Considering the drafting agency, similar to previous years, the comments of the VCCI to the Ministry of Finance has been accounted for the largest proportion because of the large number of documents related to enterprises drafted by this Ministry each year, especially documents on reducing fees and charges for businesses during the Covid-19 epidemic, and followed by comments to documents elaborating laws drafted by the Ministries of Agriculture and Rural Development, the Ministry of Natural Resources and Environment, and the Ministry of Transport.

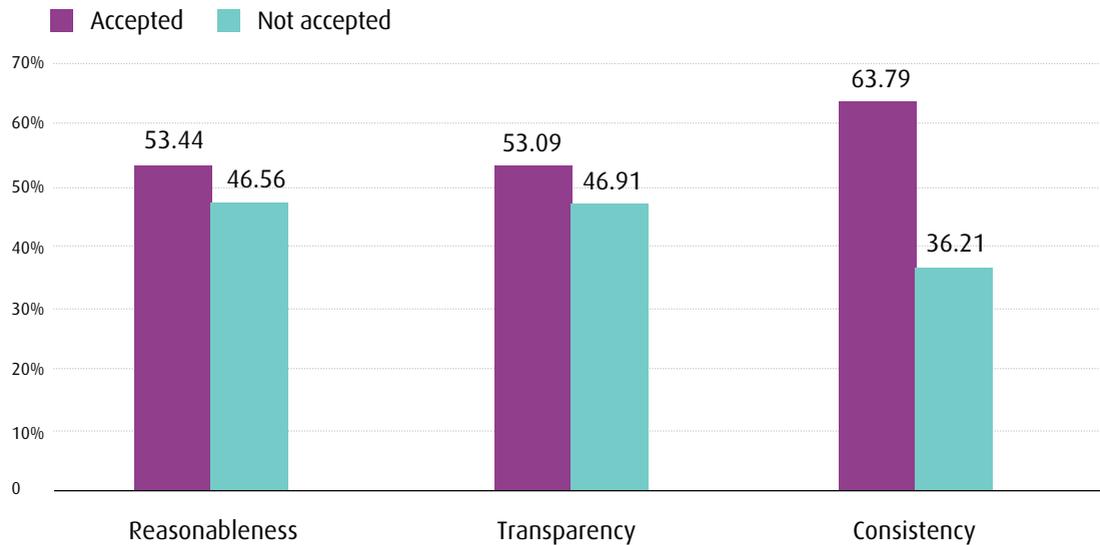
Figure 5. Comments to drafting Agencies by criteria



THE RATE OF ACCEPTANCE BY COMMENT CRITERIA

In general, the rate of comments accepted classified by criteria is quite high and even. The rate of acceptance is higher than the rate of refusal in all three criteria.

Figure 6. Rate of comments accepted by criteria



Among the three criteria, the rate of comments accepted is the highest in relation to consistency (63.79%). The number of comments accepted is also much higher than the number of comments refused (nearly double - 63.79% compared to 36.21%) in relation to consistency.

However, many comments related to transparency have not been reflected on issuance of documents, with 46.91% of the comments are not accepted. This is regrettable because the comments under this criterion are often aimed at clarifying the regulations, procedures, order and time limit in order to avoid the risk of corruption from the enforcement agency due to the ambiguity in laws.

The number of comments on the reasonableness is accepted by drafting agencies, with the rate of over 50%. These are the comments that usually receive the least approval from drafting agencies, due to differences in attitudes toward approach. With 50% of comments accepted, it can be seen that the comments of the business community are based on convincing arguments, and also shows the progressive spirit of drafting agencies in the process of law making.

With regard to the refused comments, through review, some of the proposed groups that are often not accepted by drafting agencies include:

- Eliminating procedures annoying and creating difficulty for firms;
- Implementing one-door administrative procedures between state agencies;
- Eliminating regulations that interfere too deeply in business operations of firms;
- Eliminating unnecessary or unreasonable business conditions;

This year especially, a number of ministries have acceptance rates up to 100%, including the Ministry of Science and Technology and the Ministry of Education and Training. In addition, the rate of accepting the VCCI's comments is also obviously high in some other drafting agencies, such as the Ministry of Industry and Trade (70%), and the Ministry of Construction (73%).

In summary, with 386 comments, and a proportion of more than half of them being recorded, the comment assessment results have reflected the efforts of the business community in participating in law-making process. These achievements have also reflected the fact that law-makers are more and more paying attention to firms' opinions.

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