

RELATIONSHIP BETWEEN INVESTMENT LAW AND ENTERPRISE LAW IN VIETNAM'S LAW

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Abstract:

The Law on Investment 2020 and the Law on Enterprises 2020 are two laws that have an inseparable relationship in regulating investment activities, especially investment in the establishment of economic organizations and investment in the form of capital contribution, purchase of shares, or contributed capital of financial organizations in Vietnam. These two laws had been promulgated and took effect on January 1, 2021. In particular, some new points of the Investment Law 2020 directly affect and concern the application of the Enterprise Law 2020 and vice versa.

Keywords: Investment Law, Enterprise Law, establishment, capital contribution, purchase of shares, purchase of contributed capital, foreign investors, foreign-invested economic organizations.

I. New regulations on banned business lines and conditional business lines

The Law on Enterprises 2020 prescribes that enterprises can freely engage in any business lines not banned by law and change business lines¹. This can be interpreted that enterprises are not allowed to do business in the sequences listed in the list of prohibited business lines following the provisions of the Investment Law and other relevant laws. Therefore, the change of the list of business lines banned from investment and business in the Investment Law and other applicable laws will lead to applying the Enterprise Law. Specifically, according to the Enterprise Law 2020, one of the mandatory contents to be recorded in an application for business registration is the content of business lines². Therefore, when applying for business registration to establish an enterprise, the enterprise founder (the investor) must not register business lines listed in the list of business lines banned from investment and

business under the Investment Law and other specialized laws.

The list of business lines banned from investment and business of the Law on Investment and other laws are also applied in the change or supplementation of business lines during the operation of an enterprise. Accordingly, in the written notice of change in business registration content, the enterprise is not allowed to add prohibited ones if changing the business lines. For example, the Investment Law 2020 adds "debt collection services" to the list of business lines banned from investment and business³. Thus, since January 01, 2021, enterprises are no longer allowed to register and engage in these services upon their business registration and their change in business registration contents regarding supplementation of business lines. Therefore, if an enterprise is doing business in debt collection services, it is required to terminate these services since January 01, 2021, and to carry out procedures for changing business registration contents if the

¹ Clause 1, 2, Article 7 of the Enterprise Law 2020

² Clause 3, Article 23 of the Law on Enterprises 2020, Appendix I -1 to Appendix I-5 of Decree No. 122/2020/ND-CP, dated October 15, 2020 stipulating the coordination and interconnection of procedures for registration of establishment of enterprises,

branches and representative offices, and declaration of employment, issue of the code of the unit participating in social insurance, registering the use of the enterprise's invoices

³ Point h, Clause 1, Article 6 of the Law on Investment in 2020

enterprise wants to continue doing business in other lines that are not prohibited by law.

Another point to be noted is that the Investment Law 2020 provides new provisions on the relationship between the Investment Law 2020 and other relevant laws in applying the list of business lines banned from investment and business or conditional business lines. *The detail is as follows: "If there are any different provisions between this Law and other laws regarding sectors and trades banned from business investment, sectors and trades subject to conditional business investment, or the order and procedures for business investment, the provisions of this Law must prevail, except for the order and procedures for business investment prescribed in the Securities Law, the Law on Credit Institutions, the Law on Insurance Business and the Law on Petroleum."* "Where regulations on banned business lines or conditional business lines in the Investment Law and other laws are inconsistent and have been promulgated before the effective date of the Investment Law, regulations of the Investment Law shall apply." Also, "Where a law promulgated after the effective date of the Investment Law contains regulations on investment contradicting regulations of this Law, the former is required to specify the cases to which the Investment Law applies or does not apply and the cases to which the other law's regulations apply." Meanwhile, the Investment Law 2014 stipulates that the legal value of the Investment Law is higher than that of other laws on the list of banned business lines, except for the order and procedures for business investment in four specific fields. Some conditions for foreign investment in Vietnam in the form of capital contribution, share purchase, purchase of capital contribution to economic organizations, *Journal Industry and Trade, No. 9, May 2020, page 14*].

Thus, according to the new provisions of the Investment Law 2020, the banned business lines or the conditional business lines are divided into two groups.

A first group is a group of banned business lines or conditional business lines promulgated before the effective date of the Law on Investment 2020 (before January 01, 2021). Regarding this group, if the regulations on the list of banned business lines or conditional business lines in other laws and the Investment Law are inconsistent, the list

specified in Article 6 and the Appendices of the Investment Law shall be applied. In addition, the provisions on the banned business lines and the conditional business lines in other laws must also be consistent with Article 6 and the Appendices of the Law on Investment⁴.

A second group is a group of banned business lines and conditional business lines prescribed in other laws promulgated after the effective date of the Investment Law 2020 (after January 01, 2021). Regarding this group, if the regulations of other laws are different from those of the Law on Investment, it is possible to specify the cases to which the Investment Law applies or does not apply and the instances in which the other laws' regulations apply. It can be interpreted that the specialized rules may stipulate and apply differently from the Investment Law 2020 in terms of prohibited business lines conditional business lines if those laws are promulgated after January 01, 2021. For example, after January 01, 2021, if the National Assembly passes another law in which business lines belong to the list of prohibited ones of the Investment Law 2020, the National Assembly has the right to determine the business lines in that law applicable under that law but not under the Investment Law 2020.

Via the said new provisions of the Law on Investment 2020, the business registration agency, when applying the Enterprise Law 2020, must also review the business lines registered by investors in the business registration application form or the written notice of supplementation, change in the written business lines to ensure the enterprises' right to freely engage in doing business and obligations in meeting the conditions for business investment when engaging in conditional business lines⁵.

2. New regulations on dossiers for the establishment of foreign-invested economic organizations

Economic organization means an organization established and operating under Vietnam's law. Financial organizations include enterprises, cooperatives, unions of cooperatives, and other organizations which carry out business investment activities. A foreign-invested economic organization means an economic

⁴ Clause 2, Article 4 of the Investment Law 2020

⁵ Clause 1, Article 8 of the Enterprise Law 2020

organization has members or shareholders being foreign investors⁶.

Previously, by the provisions of the Investment Law 2014, "before establishing an economic organization, a foreign investor must have an investment project and shall carry out procedures to apply for an investment registration certificate⁷." This regulation obliges all foreign investors who want to become members and founding shareholders to establish an enterprise in Vietnam to have a project and possess an investment registration certificate under the provisions of the Law on Investment⁸. Therefore, this is one of the conditions for business registration documents according to the requirements of the Enterprise Law⁹.

The Investment Law 2020 maintains the conditions in connection with the investment registration certificate before establishing a foreign-invested economic organization. However, this Law adds two exceptions where it is not required to carry out the procedures to apply for an investment registration certificate. Specifically, "*before establishing a business entity, the foreign investor must have an investment project and follow the procedures for issuance or adjustment of an investment registration certificate, except for the establishment of a small and medium-sized startup enterprise and a startup investment fund under regulations of the law regarding assistance to small and medium-sized enterprises*¹⁰." Meanwhile, the Enterprise Law 2020 stipulates the dossier for registration of partnerships, limited liability companies, and joint-stock companies that it is obligated to have "*the investment registration certificate for foreign investors following regulations of the Law on Investment*¹¹." Thus, when applying the Enterprise Law 2020, for the cases of establishment of a small and medium-sized startup enterprise and a startup investment fund under regulations of the law regarding assistance to small and medium-sized enterprises, the business registration agency is not allowed to require an investment registration certificate in the dossier.

3. New regulations on conditions for foreign investors to establish economic organizations, contribute capital, purchase shares, and purchase contributed money of economic organizations in Vietnam

Investment Law 2020]. Form of investment in establishing an economic organization is a form of investment in which a foreign investor acts as a member or founding shareholder to establish a foreign-invested economic organization. The form of investment by contributing capital, purchasing shares, or capital contributions to an economic organization is when foreign investors become members or shareholders of a previously established economic organization. This form includes a) Purchase of shares of joint-stock companies through the initial public or additional issuance; b) Contribution of capital to limited liability companies and partnerships; c) Contribution of capital to other business entities not mentioned in the said cases¹². In addition, the form of purchasing shares or contributed capital includes: a) Purchase of shares in a joint-stock company from such company or its shareholders; b) Purchase of capital contributions of members of a limited liability company to become a member of such limited liability company; c) Purchase of capital contributions of a capital contributing member of a partnership to become a capital contributing member of such partnership; d) Purchase of capital contributions of members of other economic entities not mentioned in the said cases¹³. According to the Enterprise Law 2020, this is a form of additional contribution to the charter capital of an established company¹⁴.

According to regulations, when foreign investors invest in the Vietnamese market, they must satisfy all conditions applied to domestic investors and additional specific conditions (if any) exclusively for foreign investors. Therefore, when investing via the above forms, both the Investment Law 2020 and the

⁶ Clause 21, 22, Article 3 of the Investment Law 2020

⁷ Clause 1 Article 22 of the Investment Law 2014

⁸ Cao Nhat Linh, Ho Duc Hiep (2020), *Some inadequacies of the Investment Law relating to foreign investment in Vietnam*, Finance Magazine, 05/2020, page 75

⁹ Articles 21, 22, 23 of the Enterprise Law 2014

¹⁰ Point c, Clause 1, Article 22 of the Investment Law 2020

¹¹ Articles 20, 21, 22 of the Enterprise Law 2020

¹² Clause 1, Article 25 of the Investment Law 2020

¹³ Clause 2, Article 25 of the Investment Law 2020

¹⁴ Clause 8, Article 4 of the Enterprise Law 2020

Enterprise Law 2020 stipulate the conditions for foreign investors to access the market. In essence, this is not a new condition in the Vietnamese law applied to foreign investors, but a new term refers to the conditions that foreign investors need to meet when investing in Vietnam.

Previously, the investment in the establishment of economic organizations, capital contribution, purchase of shares, contributed capital by foreign investors in Vietnamese enterprises must satisfy the conditions on the charter capital holding rate in some cases under the provisions of the law on securities, equitization, and transformation of state-owned enterprises¹⁵. However, the Investment Law 2020 focuses on interpreting all business investment conditions of foreign investors into market access conditions. This is a condition that foreign investors must meet to invest in business lines listed in the list of business lines restricted to foreign investors. In other words, these are conditional market access business lines, especially conditions in connection with foreign investors' charter capital holding rate in economic organizations, investment firms, the scope of investment activities, the capacity of investors and partners participating in investment activities, and other conditions¹⁶. Thus, the condition on the charter capital holding rate foreign investors in economic organizations as prescribed in the Investment Law 2014 is just one of the market access conditions specified in the Investment Law 2020. Therefore, according to the new provisions of the Investment Law 2020, when applying the Enterprise Law 2020 in registering establishment of foreign-invested enterprises, accepting members and shareholders who are foreign investors in enterprises in Vietnam, the business registration agency must additionally review the market mentioned above access conditions under the provisions of the Law on Investment 2020. The Law on Enterprises 2020 also provides additional regulations on the obligations of enterprises to meet all business investment conditions when engaging in "conditional market access business lines for foreign investors under the provisions of law

*and fully ensure such conditions during the business operation process*¹⁷."

In addition, especially for the investment form of capital contribution, purchase of shares, contributed capital, the Investment Law 2020 has additional conditions for foreign investors to invest in Vietnam: "a) satisfy market access conditions applied to foreign investors as prescribed in Article 9 of this Law; b) ensure national defense and security under this Law; c) comply with regulations of the law on land and conditions for receipt of land use rights and conditions for the use of land on islands or border or coastal communes¹⁸." Therefore, when applying the Enterprise Law 2020 in the procedures for accepting members and shareholders who are foreign investors, the business registration agency is required to check additional conditions applied to foreign investors regarding assurance of national defense and security and conditions. Those are for land use rights, conditions for land use in islands, border communes, wards, townships, coastal communes, wards, and townships following the law on lands.

4. New regulations on implementation of investment activities of foreign-invested economic organizations

According to the Law on Investment 2014, when investing in the establishment of economic organizations, capital contribution, or purchase of shares or contributed capital of economic organizations or investment in the form of BCC contract, economic organizations must meet the conditions and carry out investment procedures according to regulations applied to foreign investors if falling into one of the following cases: "a/ Having 51% or more of their charter capital held by a foreign investor(s), or having a majority of their general partners being foreign individuals, for partnerships; b/ Having 51% or more of their charter capital held by an economic organization(s) prescribed at Point an of this Clause; c/ Having 51% or more of their charter capital held by a foreign investor(s) and an economic organization(s) prescribed at Point an of this Clause¹⁹."

¹⁵ Clause 3, Article 25, Points a, b, Clause 1 and Clause 3, Article 22 of the Investment Law 2014
¹⁶ Clause 2, 3, Article 9 of the Investment Law 2020

¹⁷ Clause 1, Article 8 of the Enterprise Law 2020

¹⁸ Clause 2, Article 24 of the Investment Law 2020

¹⁹ Clause 1, Article 23 of the Investment Law 2014

Regarding this provision, the Investment Law 2020 has a new point. Specifically, *“When establishing a business entity, when investing by contributing capital, purchasing shares or purchasing stakes of a business entity or when making investment under a business cooperation contract in one of the following cases, the foreign investor must satisfy the conditions and follow investment procedures applied to foreign investors: a) Over 50% of its charter capital or more is held by a foreign investor(s) or the majority of the general partners are foreigners if the business entity is a partnership; b) Over 50% of its charter capital or more is held by a business entity(ies) mentioned in Point a of this Clause; c) Over 50% of its charter capital or more is held by a foreign investor(s) and a business entity(ies) mentioned in Point an of this Clause²⁰. ”*

Firstly, the provisions in the Law on Investment in 2020 are more transparent and easier to understand by the phrase "when investing in the establishment of another economic organization," "of another economic organization." This overcomes the confusion of the provisions of the Investment Law 2014 for investors who do not have in-depth knowledge of the law. If applied in the Law on Enterprises, this content can be interpreted as follows: Foreign-invested enterprises are investors. These enterprise have the right to be the founding members of another company or to contribute capital, purchase shares or capital contributions of another company to become a member or shareholder of such company (while the foreign-invested enterprises still exist and operate at the same time).

Secondly, the provisions of the Investment Law 2020 expand the group of foreign-invested economic organizations that *"must meet the conditions and carry out investment procedures as prescribed for foreign investors."* Specifically, economic organizations with more than 50% of their investment capital by foreign investors, if establishing other economic organizations, must comply with the same investment conditions and procedures as foreign investors' conditions and policies. Meanwhile, the Enterprise Law 2014 prescribes that only economic organizations with 51% or more of their investment capital by foreign investors

must comply with the investment conditions and procedures applied to foreign investors.

For example, ACB Limited Liability Company has a charter capital of 100 billion dong. The money of Vietnamese investors is VND 50.5 billion, and the capital of foreign investors is VND 49.5 billion. When ACB company invests capital in establishing another company or in contributing capital, purchasing shares, the capital contribution of another company, if the investment is made before January 01, 2021, then ACB company is the investor. The investment conditions and procedures applied to them are the same as those of domestic investors (not having to meet market access conditions of foreign investors and have projects, carry out functions to apply for an investment registration certificate). The Investment Law 2014 prescribes that only when ACB company has at least 51%, foreign capital must meet conditions and carry out procedures as applied to foreign investors. However, if ACB company invests from January 01, 2021, or later, they must meet the market access conditions like the market access conditions of foreign investors. In addition, ACB must have projects and carry out the procedures to apply for an investment registration certificate like a foreign investor. The Investment Law 2020 stipulates that as long as ACB company has more than 50% of their capital by foreign investors, they must meet the same conditions and procedures as foreign investors. Similarly, the Investment Law 2020 also applies the "over 50% of charter capital" rate for the remaining two cases instead of "from 51% of charter capital" according to the Law on Investment 2014.

It should be noted that the phrase *"must meet the conditions and carry out investment procedures as prescribed for foreign investors"* applied to the three cases mentioned above is the same application as the application to foreign investors. Still, it does not mean that these cases are foreign investors. According to the Investment Law, a foreign-invested economic organization is a unique investor of Vietnamese nationality. Yet, there are cases where Vietnamese investors apply, and there are regulations on foreign investors' use. The rules where a foreign-invested economic organization operating in Vietnam is an investor to establish

²⁰ Clause 1, Article 23 of the Investment Law 2020

another economic organization or contribute capital, purchase shares, contribute capital of another economic organization. It explains why the Investment Law 2020 is also directly related to the application of the Enterprise Law 2020 when the business registration agency receives the dossier and handles procedures regarding business registration, registration of change in the content of enterprise registration.

5. New regulations on time of capital contribution to establish a company

The Enterprise Law 2020 adds some exceptions on capital contribution to establish a company, including an exception on the time of capital contribution from when the company is granted the certificate of business registration. Specifically, for one-member limited liability companies and two or more-member limited liability companies, the company's owner or founding members must contribute capital to the company in the sound and correct form of assets committed upon their registration of business establishment within 90 days from the issuance date of the business registration certificate. However, the Enterprise Law 2020 supplements an exception to this period that *"does not include the time for transporting and importing assets contributed as capital, and carrying out administrative procedures to transfer property ownership"*²¹. It means that the entire time to transport and import assets contributed as capital and time to carry out administrative procedures to transfer ownership of assets contributed as capital to the company is not included in the above 90-day period. In other words, for assets contributed as capital that are overseas assets that must be transported to Vietnam or require administrative procedures to transfer the ownership, the total time that the owner, the member of the company, must fully contribute to the company can exceed 90 days. At the same time, the Enterprise Law 2014 does not make this exception. For joint-stock companies, the Enterprise Law 2020 also has a similar exception. Specifically, *"in case shareholders make a capital contribution by assets, the time needed to transport or import the contributed assets and for completing ownership transfer procedures shall not be added to the time of capital contribution"*²². From the new

regulations mentioned above, we can conclude that Enterprise Law 2020 has created favorable and reasonable conditions for investors, especially foreign investors, to invest and establish enterprises in Vietnam when their capital contribution assets are abroad.

In addition to the new regulations in the relationship between the Investment Law 2020 and the Enterprise Law 2020, the Law on Investment 2020 no longer regulates investment activities for investment contracts in the form of public-private partnerships – PPP. The reason form has been separated and regulated by the Law on Investment 2020 in public-private association). It is also related to the application of the Law on Enterprises in the establishment of project enterprises in this type of investment. In other words, the Investment Law 2020 and the Enterprise Law 2020 no longer have the relationship on the establishment and operation of a project enterprise to conclude and implement projects through a public-private partnership contract (PPP).

Conclusion and recommendations

The Investment Law 2020 and the Enterprise Law 2020 have many new points compared to the 2014 Law on Investment and the 2014 Law on Enterprises. In addition to any specific new features of the two documents, there are also new points of this document directly related to the provision or application of the other document. However, some new points still represent inadequacies that need explicitly guided and clearly in the upcoming Decrees detailing the implementation.

Specifically, Clause 2 of Article 4 of the Law on Investment in 2020 defines *"Where regulations on banned business lines or conditional business lines in the Investment Law and other laws are inconsistent and have been promulgated before the effective date of the Investment Law, regulations of the Investment Law shall apply. Regulations on names of banned business lines and conditional business lines in other laws must be consistent with those set out in Article 6 and Appendices of the Law on Investment."* Thus, *"regulations on names of banned business lines and conditional business*

²¹ Clause 2, Article 47, Clause 2, Article 75 of the Enterprise Law 2020

²² Clause 1, Article 113 of Enterprise Law 2020

lines in other laws must be consistent with those set out in Article 6 and Appendices of the Law on Investment” can be only applicable to other laws promulgated from June 17, 2020. Suppose another law is promulgated after January 01, 2021. In that case, such law has the right to apply Clause 4, Article 4 of the Investment Law 2020 to make specific investment provisions different from the Law on Investment 2020.

In addition, the provisions in Clause 4, Article 4 of the Law on Investment 2020 are unclear. It makes readers deduce from Clause 2, Article 4 above for other laws promulgated after January 01, 2021, containing regulations on prohibited business lines or conditional business lines that are different from the list of banned business lines or dependent business lines of the Law on Investment. This ambiguity may lead to difficulties in applying the Enterprise Law 2020 to deal with the procedures for registration of business lines and many opposing views for the said problem. Therefore, to facilitate the uniform and accurate application, the guiding document on the application of the Investment Law 2020 should explain more clearly the content of Clause 4, Article 4 above. That is: “Where a law promulgated after the effective date of the Investment Law contains regulations on investment contradicting regulations of this Law, the former is required to specify the cases to which the Investment Law applies or does not apply and the cases to which the other law’s regulations apply.”

Besides, the Investment Law 2020 does not stipulate the conditions for having an investment registration certificate for establishing a small and medium-sized startup enterprise and a startup investment fund by law regulations regarding assistance to small and medium-sized enterprises. However, Article 20, Article 21, and Article 22 of the Enterprise Law 2020 stipulate that an Investment Registration Certificate is required for all companies with foreign investors as members or founding shareholders. In this case, the business registration agency can compare with the provisions on the application of the Law on Enterprises and other laws in the Enterprise Law 2020: “In case other laws have specific provisions on the establishment, organization, management, reorganization, dissolution and related activities of an

enterprise, the provisions of such laws shall apply²³.” However, so that the provisions of the law can be consistent and transparent, to facilitate the investors’ approach most understandably, the Decree guiding the implementation of the Enterprise Law 2020 on business registration should concretize these exceptions in detail. In addition, when promulgating the Decree on business registration under the Enterprise Law 2020, it is necessary to be consistent in regulations on the investment registration certificate and the copy of the investment registration certificate. The reason is that Article 20, Article 21, Article 22 of the Enterprise Law 2020 stipulates an inconsistency between the copy (Article 20) and the original (Article 21, Article 22) of this paper.

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²³ Article 3 of the Enterprise Law 2020