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Government issues new decree to cover legal loopholes

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On September 5, 2007 the Vietnamese government issued Decree No. 139/2007/ND-CP to provide more details on the implementation of several articles of the Law on Enterprises. This move aims to simplify the establishment and operation of companies in Vietnam.

Business conditions tightened

The first welcome move creates a legal framework to control the development of unconscionable business conditions. Decree 139 emphasises that only the prime minister and superior government authorities, the National Assembly or others, can stipulate business conditions and sublicenses for the incorporation of companies. Any sublicenses provided by other authorities will be terminated from September 1, 2008 onward.

This change is a response to the increasing number of new licenses noticed by the Vietnam government. The new business conditions will help build a more transparent environment that will compel investors to comply with specific laws, rather than those created by ministries, many of which are sometimes unconscionable.

Decree 139 introduces a tighter provision on professional practice certificates issued in foreign countries; it states that Vietnam will not accept certificates issued in foreign countries, unless they are guided by specific laws or international treaties to which Vietnam is a member. This means that Vietnam will no longer accept foreign practice certificates as satisfactory for business conditions. Decree 139 will affect hundreds of foreign invested enterprises currently operating on professional practice certificates previously issued by foreign authorities.

Foreign equity borderline of 49 percent

According to Decree 139, if an enterprise has a foreign equity of 49 percent or less, it will be treated as a Vietnamese-invested enterprise, in terms of business conditions and establishment procedures. As such, when investors want to establish a company that has more than 49 percent of foreign equity, they must simultaneously apply for an investment licence and establishment certificate. A company with foreign equity of 49 percent or less is required to acquire only the single establishment certificate before establishment.

Cap on foreign equity acquisition

In line with the new Law Investment, Decree 139 confirms that any legal entity, including foreign invested companies, can contribute equity or acquire shares in local companies without limitation, except in: (1) the cap of 49 percent listed shares; (2) the acquisition of converted or privatised state-owned companies; (3) caps provided by other laws, such as banking and insurance; and (4) caps provided in commitments to the World Trade Organization.

Minority shareholders better protected

According to the Law on Enterprises, a member of a limited liability company can require the company to redeem shares only when such member voted against the board of members' decision to adjust articles of incorporation, change the Board and members' rights, restructure the company or in other cases, as stated in the articles of incorporation. In these circumstances, Decree 139 states that if the company does not redeem the share of capital contribution, does not make payment or disagrees on the price of the redeemed shares, the member can transfer shares to outside investors. In normal cases, members will not have pre-emption rights.

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