Vietnam: New decree implementing the Public Private Partnership (PPP) Investment Law

The government of Vietnam recently issued new Decree No. 35/2021 dated 29 March 2021 ("**Decree No. 35**"), providing important guidelines implementing a number of provisions of the PPP Law,[1] including the following topics:

- Sectors eligible for public-private partnership (PPP) investment and minimum investment scale
- Additional guidelines on early termination events and termination compensation payments under PPP project contracts
- Compensation in cases where the project is terminated/stopped due to the transition from the previous PPP regulations (i.e., Previous Decree No. 63)[2] to the new PPP Law

Recommended actions

PPP project investors looking for opportunities in Vietnam may keep track of PPP regulatory developments in order to grasp key legal implications and take the necessary steps to ensure the best position for their projects.

Please do not hesitate to contact us if you would like to know more about any legal, regulatory and contractual issues, including the following specific matters:

- Further details on the legal development on PPP projects in different sectors in Vietnam
- Specific opportunities and challenges, as well as legal and practical solutions, for investing in PPP projects under the new legal landscape in Vietnam
- More specific implications and practical advice for financing, developing and managing PPP projects in specific sectors, from energy projects, water supply and treatment, to transportation infrastructure and other PPP projects

In depth

Eligible sectors for PPP investment and minimum scale

Decree No. 35 provides a more specific list of investment projects for the sectors eligible under the PPP Law. By providing an exhaustive list of eligible sectors for PPP investment, Decree No. 35 limits the scope for PPP investment projects more clearly.

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[1] Law No. 64/2020/QH14 adopted by the National Assembly dated 18 June 2020 on PPP investment ("**PPP Law**").
[2] Decree No. 63/2018/ND-CP of the Government dated 4 May 2018 on PPP investment ("**Previous Decree No. 63**").

In terms of the sectors eligible for PPP investment, the PPP Law provides a general list of sectors, including: (i) transportation; (ii) power grids and power plants; (iii) irrigation, water supply, drainage and wastewater treatment, and waste treatment; (iv) healthcare, education and training infrastructure; and (v) investment technology infrastructure.

To implement the PPP Law, Decree No. 35 provides relevant specific sub-sectors for eligible projects, as follows:

- Transport: road, railways, domestic waterways, maritime and aviation
- Power grids, power plants (except for hydropower plants and the state's monopolies according to the Electricity Law): thermal power, renewable energy, gas-fired power and liquefied natural gas (LNG), nuclear power and transmission grids for interconnection between power plants of the above power sectors and the national power grid system
- Irrigation, water supply, drainage and wastewater treatment, waste treatment: irrigation; water supply, drainage and wastewater treatment, and waste treatment
- Healthcare: health examination and treatment facilities, preventive medicine services, medical testing
- Education and training infrastructure: Infrastructure, facilities, and equipment for education, training and occupational training purposes
- Information technology infrastructure: digital information infrastructure, digital economy; modernization of information technologies in agencies of the party and the government; application and development of information technologies, databases, data centers; platforms, application, public services; network safety and security; systems applying information technology, services for citizens and businesses; information and communication technology (ICT) infrastructure for smart cities

Decree No. 35 seems to limit eligible projects for PPP investment to the list mentioned above. In addition, although certain nuclear power projects are monopolized by the state, it is not clear whether Decree No. 35's reference to nuclear power projects means that nuclear power projects are open to private investors via PPP form.[3]

In terms of the eligible PPP investment scale, Decree No. 35 specifies a minimum investment capital threshold for each eligible PPP investment sector, as follows:

- Transport: VND 1,500 billion (approximately USD 65 million)
- Power grids, power plants*:* VND 1,500 billion (approximately USD 65 million), except for renewable energy projects for which the minimum is VND 500 billion (approximately USD 21.6 million)
- Irrigation, water supply, drainage and wastewater treatment, waste treatment: VND 200 billion (approximately USD 8.6 million)
- Healthcare*:* VND 100 billion (approximately USD 4.3 million)
- Education and training infrastructure*:* VND 100 billion (approximately USD 4.3 million)
- Information technology infrastructure: VND 200 billion (approx. USD 8.6 million)

Termination of PPP project contracts

Termination events and compensation payments upon termination, also known as "buyout" amounts, are briefly discussed in Decree No. 35.

Decree No. 35 emphasizes that a PPP contract party is entitled to unilaterally terminate the PPP project contract (i.e., early termination) if the counterparty materially breaches its contractual obligations. However, Decree No. 35 does not clarify under what circumstances a contract breach is considered as "a material breach" in a PPP project contract so that in such event, a party should be entitled to terminate the PPP project contract.

From a private sector perspective, although the right of unilateral termination is reciprocal, such right might be more relevant for project investors rather than by the governmental contracting party. This is because termination by the governmental contracting party as an off-taker may leave the project with nowhere to sell its proposed products or services. Private investors will therefore look to limit the rights of governmental agencies (whether in the capacity as a licensing authority or a PPP contracting party) to terminate the PPP project contract. Hence, given governmental contracting party may terminate PPP contracts when the private party has a "material breach", private investors might consider defining with clarity the cases where a breach is considered as "material" as part of negotiating the project contracts for specific projects to mitigate termination right and manage risk allocation issues.

Because termination of the PPP project contract may leave the project without access to the market, private investors will also have to protect themselves financially from the consequences of termination.

As for compensation payments upon termination events, Decree No. 35 is silent on the method of calculating them, and on the formula for determining compensation payments to give sufficient certainty and comfort in terms of such financial protections.

In this respect, Decree No. 35 only states that the parties shall agree on a formula or a mechanism for determining the compensation amount under PPP contracts. As such, while there are flexibilities for negotiations on a project-by-project basis, without a clear policy on minimum protections, there can be certain concerns as to whether private investors would be able to negotiate actual project contracts to agree on a reasonable formula for determining compensation payments with clear and sufficient financial protection.

As a key consideration for negotiations, PPP project contracts should clearly set out not only the bases on which each party may terminate the PPP project contracts, but also and more importantly the consequences that flow from such termination.

For termination compensation payments, the PPP project contract should provide that the termination payment must become payable if termination occurs. Unless termination is a direct result of an unjustified investor breach, lenders will seek to ensure that the investor/project company receive a termination payment by way of compensation that is at least equal to the full amount of the project company's outstanding senior debt. If the termination is a result of a governmental agency's default or prolonged political force

[3] Nuclear power projects that are important to the economy and society are monopolized by the state in accordance with the annex of Decree No. 94/2017/ND-CP of the government dated 10 August 2017 on commercial goods and services, under which monopoly is held by the state and geographical areas.

majeure (also known as governmental events), then lenders and investors may also seek compensation for their expected return on equity.

Change-in-law risk allocation

Decree No. 35 remains silent as to risk allocations in cases of changes in law, policies or costs that can be relied upon when negotiating a PPP project contract for sufficient adjustments to the payments for services and products to be provided by the project company/investors to the governmental contracting counterparty.

As a key consideration for negotiations, the change in law is an important consideration for PPP investors given that under the PPP Law, it may trigger amendments to the PPP project's approvals and/or contracts, specifically as follows:

- An investor must obtain an amendment to the issued investment policy decision if a change in policies affects the investment objectives, location, scale or contract type, or increases the total investment amount by at least 10% or increases the state's capital value.[4]
- An investor must obtain re-approval for the feasibility study report if a change in policies directly affects the project's objective, location or scale.
- An investor or its counterparty may amend the PPP project contract if a change in policies causes a material impact on the project's technical and financial plans, the prices of products, or cost of public services that the PPP project company supplies.[5]
- An investor and its counterparty may amend the contract's term if a change in policies reduces the project revenue to lower than 75% of the level set out in the financial plan stipulated in the contract. [6]
- The state provides a mechanism for sharing a revenue decrease risk with the investor only if the decrease is caused by a change in policies. Accordingly, when the actual revenue is lower than 75% of the level set out in the financial plan, the state may share 50% of such difference with the private parties.[7]

Changes in law arrangements for the project can result in net project revenues going up or, more likely, down. For example, an increase in costs due to changes in policies and laws that are payable by the project company/investors may not affect the prices of products that the project company/investors deliver to the governmental counterparty, but it will affect the profits or return that the project company/investors can distribute to their lenders.

From a risk allocation standpoint, the parties to a PPP project contract need to allocate the risk of changes in laws or policies between them. Lenders can be particularly sensitive in projects where a governmental agency or a state-owned enterprise is a contractual counterparty who, by implication if not by fact, may be able to influence laws or policy rules. Lenders may also be particularly sensitive if the economic viability of a project is contingent on tax or investment incentives (e.g., in the case of renewables projects that are typically eligible for certain incentives).

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[4] Article 18 of the PPP Law.
[5] Article 50 of the PPP Law.
[6] Article 51 of the PPP Law.
[7] Article 82 of the PPP Law.

As a key consideration for negotiations from a private sector perspective, the PPP contract should be negotiated to ensure that the governmental contractual counterparty bears the risk of the law or policy regime changing after the date of the agreement and diminishing the economic returns of the project for the project company/investors. To ensure that a PPP project contract is "bankable", especially on a project finance basis, most lenders would typically require the public sector contractual counterparty to bear this risk (preferably in a form that is certain and clear, such as supplemental tariffs).

Compensating to investors for the transitional process

The transition from the previous PPP regulations to the PPP Law will stop the development of certain projects (e.g., a project investor seeking a Build-Transfer (BT) opportunity or a project in an investment sector that is no longer eligible under the PPP Law). As such, those projects' investors may face the risk of losing certain investment costs incurred in relation to those project developments. Decree No. 35 adopts a mechanism for compensating such potential loss in certain cases. Specifically, the state's relevant agency may compensate the investor as follows:

- The investor must bear all the risks and costs, except for cases where there is a written agreement between the competent state agency and the investor stating that the state must reimburse all such costs in either of the following cases:
    - Projects that have been stopped because they were no longer in the eligible sectors or do not satisfy the minimum total investment capital amounts under PPP Law
    - BT projects that have been stopped because there has not been any issuance of tender invitation or sets of requirements for that BT projects
- For BT projects that are allowed for continuous development under the PPP Law, project owners are entitled to a payment in accordance with regulations on using public assets. Under the PPA Law, BT projects can be continuously developed after the tender invitation documents or set of requirements has been issued. In those cases, the compensation principles are as follows:
    - Value determination of such BT project must be in accordance with the laws on investment and construction and other applicable regulations.
    - Using land, or head office areas as compensation for such BT project's investors must be in accordance with the land law.
    - Value of land, or head office areas used as compensation for such BT project's investors must be compliant with the principle of price parity under which value of land, headquarters must be in equivalent to the value of such BT project.
    - Value of land, or head office areas used as compensation for BT project's investors will be recorded as state budget revenues and expenditures in accordance with the laws on the state budget management.

Other implementing guidelines

Decree No. 35 also provides for detailed guidelines for implementing the PPP Law on the following matters:

- Detailed procedures and regulatory forms in order to select PPP investors, including the following four selecting methods: (i) open tendering; (ii) competitive negotiation tendering; (iii) investor appointment; and (iv) selecting investors in special cases
- General principles and criteria for selecting PPP investors
- Guidance on formulating PPP project's contracts, including the in-principle terms and provisions to be included.