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This issue covers the following topics:

Vietnam

ACQUISITION OF PUBLIC LAND IN VIETNAM

昨今、ベトナムでの不動産開発に対する関心は非常に強いが、他方で、国営企業などから過去に払い下げられた土地について、その払下げ手続の適法性などが事後的に特別監査の対象とされ、不動産開発案件に重大な影響を及ぼすケースも出てきている。本稿では、ベトナムにおける土地の払下げ手続を巡る法制について概観する。

Background

There are several ways to acquire land use rights ("**LUR**") for developing a project in Vietnam, but for local real estate developers, "being appointed" as an exclusive investor for the project would be the preferred way.

An investor is often "appointed" by a decision of the relevant governmental body without going through an auction or tendering process. Most of these decisions have been made by the provincial people's committee, which has the authority to allocate or lease land in its province. Once appointed, an investor has the exclusive right to acquire the LUR from existing land users holding the LUR under private ownership or state ownership. However, the acquisition of LUR under state ownership has recently been subject of examination by the central government. Several dozens of real estate projects have been reported to be under audit or inspection for accusations of failing to comply with the auction/tendering regulations and causing financial losses to the State. As a result, some executive officials in Ho Chi Minh City and Da Nang have been dismissed or arrested for wrong doing. Notably, the State Inspectorate has been reported to have instructed one provincial people's committee to recover land from a developer, who was conferred with the LUR without an auction, in order to conduct the auction.

In this article, we will discuss the relevant laws on the acquisition of LUR under state ownership and comment on the recent developments.

The Previous Laws

Introduction of auction and tendering concepts: The legal concept of "auction of LUR" existed as early as 1998 under Decree 14 dated 6 March 1998 on management of state assets, which stipulated that the sale of state assets (including LUR) must be conducted through an auction. Soon after, Decree 04 dated 11 February 2000 on the implementation of the Land Law 1993 (as amended in 1998) provided the concept of "tendering for selection of an investor" in a build-transfer ("**BT**") project where the successful tenderer (i.e., the investor) is awarded the LUR for

developing the project. An auction is similar to tendering, in that land clearance must be taken charge of by the government under both decrees. However, the difference is that an approved project for the land is required for tendering, while only an approved master plan is required for an auction.

Land Law 2003[1] listed four purposes of land use ("**Four Categories**") where allocation or lease of land by the state to the developer must be conducted either by auction or tendering in accordance with the respective regulations, *viz*:

i. residential development for sale or lease;
ii. infrastructure development for assignment or lease (i.e., industrial parks, economic zones);
iii. creating capital for infrastructure development (i.e., BT projects); and
iv. business or production facilities.

However, despite the foregoing provisions, no specific regulations on auction or tendering for the allocation or lease of land were passed until 2009 (discussed below). This was partly because there was no practical demand for the specific regulations then. There were rarely cases where the government had to confer LUR to the developer through auction or tendering at that time, since most land areas were already occupied by land users and conducting an auction required the government to compensate the existing land users (except for the LUR under state ownership), which it could not financially undertake.

Auction sale of Public Assets: On 19 January 2007, Decision 09 on re-arrangement and settlement of buildings and land under state ownership, as amended by Decision 140 dated 21 October 2008 ("**Decision 09/2007**") was issued by the Prime Minister requiring the sale of land and assets on land resulting from relocation of offices and premises of governmental bodies, state organizations or enterprises ("**Public Assets**"), to be conducted through auction unless the sale was under any of the following cases[2]:

i. After the time-limit set out in the auction announcement, there is only one individual or entity who is interested in the sale ("**Case 1**");
ii. If at the time of making decision on the sale, there is only one buyer who would use the assets and land for education, vocational, medical, cultural, sporting or environmental purposes ("**Case 2"**); or
iii. Sale of asset and land held by an authorized state-owned leasing company (e.g., housing trading company, warehousing company or public service company) in accordance with the approved re-arrangement plan ("**Case 3**").

The Prime Minister also issued Decision 86 dated 22 December 2010 which provided the financial regime and plan for the relocation of polluted establishments and other governmental organizations ("**Decision 86/2010**"). Decision 86/2010 reiterated the three cases (i.e., Case 1, Case 2 and Case 3) exempt from auction requirements as set out under Decision 09/2007, and notably allowed the relocating enterprise (i.e., existing land user) to convert the purpose of land use upon payment of land use fees for its new development project ("**Case 4a**"). The relocating enterprise may also establish a joint venture company ("**JV Company**") with other investors to implement the new development project as long as the relocating enterprise holds no less than 26% of the charter capital (i.e., equity) of the JV Company ("**Case 4b**"). However, Decision 86/2010 does not stipulate the period that the relocating enterprise must retain such equity ratio. It has been reported that in practice, there were many cases where the relocating enterprises sold off all or part of its equity in the JV Company shortly after completing the land acquisition.

Since the issuance of Decision 09/2007 and Decision 86/2010, the provincial people's committees in some cities have been reported to have granted LUR under state ownership in many sites to real estate developers without auction. The question is whether the provincial people's committee could have believed that conferring the LUR to such developers would be classified as falling under the circumstances of Case 1, Case 2, Case 3, Case 4a or Case 4b.

Tendering for selection of investor: As for the tendering regulations, the Ministry of Planning and Investment ("**MPI**") issued Circular 03 dated 16 April 2009 ("**Circular 03/2009**") on the manner of selecting investors for the

1 Article 58
2 Article 7

implementation of important investment projects which needed to use land.

Circular 03/2009 provides a broad category of projects subject to the tendering process for the selection of the investor, including residential development for sale or lease and other commercial developments at favorable locations. It also provides for tendering exemptions, such as when (i) there is only one investor participating in the tender or (ii) the implementation of the project is urgent and the tendering exemption is approved by the Prime Minister. Since the issuance of Circular 03/2009, there seems to be only a few cases where the investor has been selected for development of a project through tendering process, as compared to the auction options.

The Current Laws

Auction Regulations: Apart from reiterating the Four Categories set out under the Land Law 2003 (discussed above), Land Law 2014[3] has added the "sale of Public Assets from relocation cases" (as regulated by Decision 09/2007 and Decision 86/2010) to the list of allocation or lease of land which must be conducted through an auction. Land Law 2014 also confirms two auction exemption cases: (i) the Prime Minister permits to an exemption, or (ii) there is only one investor who is interested in the sale or the auction has been conducted two times without success. However, as discussed above, it appears quite impractical to follow and maintain the Four Categories since in practice, the government cannot afford to fund the land clearance as a pre-condition for conducting an auction.

More recently, the government has also issued Decree 167 dated 31 December 2017 providing regulations on re-arrangement and settlement of Public Assets ("**Decree 167/2017**") in order to implement the Law on Management and Use of Public Assets 2017.

Decree 167/2017 repeals Decision 09/2007 and Decision 86/2010 and generally provides that the sale of Public Assets must be conducted through auction, but the Prime Minister has the authority to decide the exemption following recommendations of the ministries or provincial people's committee in charge and the Ministry of Finance. It appears that Decree 167/2017 has removed Case 1, Case 2, Case 3 and Case 4b from enjoying the auction exemption, and auction exemptions are now limited to (i) Case 4a and (ii) the Prime Minister's decision.

Tendering regulations: The selection of investor for a public-private partnership project or a project which needs to use land is subject to Tendering Law 2013 and its implementing issuance, Decree 30/2015 dated 17 March 2015 ("**Decree 30/2015**"). MPI has also issued Circular 16 dated 16 December 2016 to provide guidelines on the implementation of the Tendering Law 2013 and Decree 30/2015, and to replace the previous Circular 03/2009, referred to above.

Similar to the auction regulations, Tendering Law 2013 also permits the "appointment" of investor in one of the following circumstances: (i) there is only one investor who registers to implement the project, (ii) there is only one investor who is capable to implement the project as such implementation relates to intellectual property, trade secret, technology or capital arrangement, or (iii) the investor who has recommended the project has been approved by the Prime Minister for meeting the requirements of being able to implement the project most feasibly and efficiently[4]. However, since the Land Law 2014 and its implementing regulations only contemplates an auction process for conferring LUR and there have been complications with the land clearance and compensation issues, the current tendering regulations do not seem to be commonly applied by the relevant authorities.

Conclusion

Although the concepts of auction and tendering were introduced as early as 1998 and 2000, respectively, the local authorities in some cities do not seem to have strictly complied with these regulations in actual practice. Perhaps, this is partly due to the ambiguity of the regulations on exemption cases.

As to the current laws, it seems that the government has fixed the loophole in relation to the sale of Public Assets. The sale of Public Assets must be conducted through an auction unless there is an approval from the Prime Minister permitting the exemption. However, since the government is still in the process of auditing and inspecting many real estate development projects which were conferred with LUR without auction or tendering, an investor who is

3 Article 118
4 Article 22.4 of Tendering Law 2013 and Article 9.3 of Decree 30/2015.

considering making an investment in such projects should carefully examine the counterparty's process of land acquisition. For M&A and real estate transactions, the legal due diligence should be extended to cover the review of the land acquisition process rather than just relying on the face of the land title documents issued by the relevant authorities.

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Philippines

NEW GUIDELINES ON NOTIFICATION OF JOINT VENTURES

フィリピンの競争法の歴史はまだ浅く、2015 年にフィリピン初の競争法が施行され、その後徐々に施行規則やガイドラインの整備が進められてきた。その一つとして、2018 年 9 月にフィリピン競争委員会によりジョイント・ベンチャーの組成に伴う通知に関するガイドラインが制定された。そこで本稿ではこのガイドラインの概要を紹介する。

Background

The Philippine Competition Commission ("**PCC**") has issued Guidelines on Notification of Joint Ventures ("**Guidelines**") last September 2018 to assist parties in assessing whether a proposed transaction should be notified as a joint venture under the Implementing Rules and Regulations ("**Rules**") of the Philippine Competition Act.

The Guidelines, which applies to all joint ventures between public or private entities, aim to supplement the PCC's 2017 Merger Review Guidelines and 2018 Guidelines on Merger Notification Threshold.

Overview: Joint Venture and its forms

The Rules define "Joint Ventures" as business arrangements whereby an entity or group of entities contribute capital, services, assets, or a combination of the foregoing, to undertake an investment activity or a specific project, where each contributing entity has the right to direct and govern the policies in relation thereto, and share in the profits, risks and losses.

The Guidelines augment this definition by recognizing that joint ventures may be formed through either:

(a) incorporating a joint venture company;

(b) entering into a contractual joint venture (a legal and binding agreement where the contributing entities perform the primary functions and obligations under a joint venture agreement without forming a joint venture company); or

(c) acquiring shares in an existing company where joint control will occur between the new and existing joint venture partners (shareholders) post-transaction.

As explained in the Guidelines, "Joint Control" refers to the ability to substantially influence or direct the strategic commercial actions or decisions of the joint venture, whether by contract, agency or otherwise. There is no minimum number of shares that must be acquired to establish joint control.

Joint Venture Notification Thresholds

Generally, a joint venture transaction is covered by compulsory notification requirements of the Philippine Competition Act when both the (a) size of party test and (b) size of transaction test are met.

(a) Size of party test

A proposed joint venture meets the size of party test if the aggregate Philippine annual gross revenues or the value of the Philippine assets of the ultimate parent entity of at least one of the Acquiring or Acquired Entities (including all the entities directly or indirectly controlled by that ultimate parent entity), exceeds Five Billion Pesos (PhP5,000,000,000).

For purposes of the size of party test, the Rules provide that the contributing entities shall be deemed the "Acquiring Entities", while the joint venture shall be deemed the "Acquired Entity".

(b) Size of transaction test

On the other hand, the size of transaction test is met in a proposed joint venture if (i) the aggregate value of the assets that will be combined in the Philippines or contributed into the joint venture exceeds Two Billion Pesos (PhP2, 000,000,000) or (ii) the gross Philippine revenues generated by assets to be combined in the Philippines or contributed into the joint venture exceeds Two Billion Pesos (PhP2, 000,000,000).

In determining the assets of the joint venture, the Guidelines provide that the following shall be considered:

- all assets which any contributing entity has agreed to transfer, or for which agreements have been secured for the joint venture to obtain at any time, whether or not such entity is subject to the requirements of the Philippine Competition Act;
- any amount of credit or any obligations of the joint venture which any contributing entity has agreed to extend or guarantee, at any time;
- deferred contributions to the joint venture which are contemplated in the joint venture agreement;
- successive contributions covered by separate agreements executed within one (1) year from the joint venture agreement; and
- contributions subject to certain conditions that may or may not occur, upon fulfillment of such conditions.

Note that unless otherwise modified or repealed, PCC Memorandum Circular No. 18-001 provides that the thresholds of the size of party test (i.e., PhP5,000,000,000) and the size of transaction test (i.e., PhP2,000,000,000) will be automatically adjusted beginning 1 March 2019 and on March 1st every succeeding year based on the Philippine gross domestic product growth of the previous calendar year.

Element of Joint Control

Under the Guidelines, a minority shareholder in a joint venture may still have substantial influence on the joint venture through power to direct or block actions that determine the "strategic commercial actions or decisions" of the business.

Therefore, there can be positive joint control by possession of majority of the voting rights in a joint venture, or negative joint control through the exercise of veto powers, which may operate by means of a specific quorum required for decisions taken at meetings or which allows the holder to use the threat of creating a deadlock situation to determine the strategic behavior of the joint venture.

Even in the absence of specific veto rights, minority shareholders may obtain *de facto* joint control where strong common interest exists between them that they would not act against each other in exercising their rights, or where the majority shareholder is highly dependent on the minority shareholder for strategic objectives of the joint venture (e.g., technologies, access to market, local know-how).

While determining which actions, decisions or objectives are considered "strategic" appears to be subjective and dependent on the market where the joint venture operates, thus far, the Guidelines have already characterized the power to determine or veto the appointment of key management personnel or members of the board, the proposed budget, adoption and amendments to the business plan and other similar aspects of business management as "strategic commercial actions or decisions" sufficient to establish joint control.

Further, the Guidelines have stated that there is no requirement for the minority shareholder to have all the veto rights mentioned to establish joint control. In some instances, it may be sufficient that one such veto right exists, depending on the content and importance of the veto right in relation to the specific business of the joint venture.

Notwithstanding, veto rights allowing minority shareholders to prevent the sale or winding up of the business, amendment of the corporation's charter, investment of corporate funds in another corporation or business, or increase or decrease in the capital stock have been recognized as "not normally sufficient" to establish joint control. We surmise that the Guidelines do not regard these particular veto powers as joint control indicators considering that a higher two-thirds shareholder vote is likewise required to approve such actions under the Philippine Corporation Code.

As can be observed, it is not essential that the joint venture partner has power to exercise influence on the day-to-day operations of the joint venture. What is decisive is that post-transaction, the joint venture partners are able to exercise influence in relation to the strategic business behavior of the joint venture.

In the absence of joint control, the merger notification threshold will be applied to determine if a share acquisition will be subject to compulsory notification requirements of the Philippine Competition Act. Correspondingly, where the transaction is notified as an acquisition of shares, but is later determined by the PCC to be a joint venture, the parties will be required to correctly notify as a joint venture.

Conclusion

As much as the Guidelines have provided some degree of clarity, the subjective aspect of evaluating whether or not joint control exists post-transaction may still leave parties with questions if their minority share acquisition qualifies as a notifiable joint venture.

While the PCC acknowledges that each joint venture will be considered with due regard to the attendant circumstances, and has signaled that the Guidelines will be applied "flexibly", but to what extent? At the end of the day, it should be remembered that the Guidelines do not set limits on the PCC's investigation and enforcement powers. If parties fail to notify the PCC and consummate a transaction covered by the compulsory notification requirements, the transaction will be considered null and void and the pre-acquisition ultimate parent entities and their successors or assigns will be solidarily liable for administrative fines of 1% to 5% of the transaction value.

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Australia

AUSTRALIA ATTACKS ENCRYPTED MESSAGING SERVICES WITH TOUGH NEW LAWS

2018 年 12 月、オーストラリアで電気通信関連法が改正された。その背景には、通信分野において暗号技術が広く利用されるようになった結果、捜査機関による組織犯罪、テロ、密輸、児童の性的搾取等の重大な犯罪に関連して行われる通信を探知することが格段に困難になったことがある。本改正では、国家の安全保障の観点からオーストラリアの国家安全保障情報機関に広範な権限を付与し、一定の場合に電気通信事業者に対して通信傍受の技術的な支援を義務づける等の内容が盛り込まれており、オーストラリア国内でも賛否議論を呼んでいることからその概要について紹介する。

Background

On 6 December 2018, the Australian government passed the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) ("**Act**"). Notably, the Act provides specific Australian security and intelligence agencies with the power to issue requests and directives to telecommunication providers that they provide assistance to those agencies in a variety of different ways. The Act also increases the power given to security and intelligence agencies to issue computer access and surveillance warrants.

The explanatory memorandum to the Act stated that the use of encryption has "significantly degraded" Australia's ability to access communications regarding, and collect intelligence into, "organized crime, terrorism, smuggling, sexual exploitation of children and other crimes". The Act is to provide a framework to allow Australia's security and intelligence agencies to work with the industry to combat the use of encryption for sinister purposes.

Key aspects

Issue of requests or directives

Under the Act, certain officers of security agencies within Australia are each individually empowered to give requests or directives to a "designated communications provider". A "designated communications provider" is defined extraordinarily broadly to capture, essentially, anything that relates to the communication of data, by any means of telecommunication (whether electronic or otherwise), including manufacturers of components of any relevant device or medium. The definition is also sufficiently broad to enable the relevant agency to issue notices or directives to providers that are not present in Australia.

There are three types of requests or directives that may be given:

- technical assistance requests;
- technical assistance notices; and
- technical capability notices.

The key differences between the three notices are whether compliance is compulsory, and who is able to issue them. All, however, are to be issued to request or compel the provider to do some act or thing in relation to the provider's activities that gives help to the relevant requesting agency in relation to, or ancillary to, the performance of the relevant agency's function to:

- enforce the Australian criminal law in so far as it relates to serious Australian offences;
- assist in the enforcement of foreign criminal laws, in so far as they relate to serious foreign offences; or
- safeguard national security.

A "serious" offence is defined to be one that is punishable by maximum prison term of three years or more. By way of example, in Australia money laundering is punishable by a maximum sentence of twenty years imprisonment.

Technical Assistance Requests: A "technical assistance request" may ask the relevant provider to *voluntarily* do a specified act or thing in connection with the performance of the relevant agency's function. That is, it is a *request* rather than a demand.

The relevant agencies with this power are the Australian Security and Intelligence Organization ("**ASIO**"), the Australian Secret Intelligence Service, and certain Australian "interception agencies". Those agencies include the Australian Federal Police ("**AFP**"), the Australian Crime Commission, and Australian state and territory police forces.

Technical Assistance Notices: "Technical Assistance Notices" are very similar to the requests referenced above, however they are not voluntary. They are directives, and may only be issued by the Director-General of ASIO or chief officers of interception agencies. If an interception agency of a state or territory wishes to issue a notice, the relevant executive officer must, however, obtain the approval of the Commissioner of the AFP prior to issuing such a notice.

Technical Capability Notices: "Technical Capability Notices" are directives, only able to be issued by the Attorney-General, that require a designated communication provider to build infrastructure for a specific purpose as dictated by the Attorney-General. Essentially, it provides the Australian government with the power to demand that a provider build in "trap doors" or similar to allow ASIO (or an interception agency) to perform their functions, as outlined above – which would, it is expected, result in a greater ability for those agencies to intercept and decrypt communications.

When may the notices be issued?

Under the Act, an issuing agency is only able to issue a notice or request in circumstances where:

- the request or notice is "reasonable and proportionate"; and
- compliance with the request or notice is both practicable, and technically feasible.

Where the issuing agency wishes to issue a technical assistance notice or a technical capability notice it must first satisfy certain consultation requirements specified under the Act, unless there are circumstances that demonstrate a notice must be issued as a matter of urgency.

As to what is "reasonable and proportionate", the Act breaks down the relevant criteria in relation to each of the three requests and notices that the issuing officer must consider. Those matters include things like the interests of national security and law enforcement, but also include "the legitimate expectations of the Australian community relating to privacy and cybersecurity".

Non-compliance

In the event that a provider receives a notice or request, it is not able to object. The Act makes it clear that a decision to issue a notice or request is not able to be judicially reviewed.

In the event that a provider fails to comply with a technical assistance notice or technical capability notice, it may be subject to a penalty of up to:

- A$10m for a body corporate; and
- A$50,000 for an individual.

Additionally, a person who releases information in respect of any such notice or request may be subject to imprisonment for up to five years.

Systemic weakness

A key criticism of the law when it was first proposed was that it took control of the relevant technology away from the owner of the technology, and could result in the provider being forced to build in features that reduced the effectiveness of the technology or similar. The Act attempts to counter this possibility by including a prohibition on

any directive requesting or requiring the implementation or building of a "systemic weakness" or "systematic vulnerability". Both of these matters are defined, and specify that it refers to a weakness or vulnerability in respect of the relevant technology as *a whole*, and does not include one that is selectively introduced to one or more target technologies that are connected with a particular person. This caveat aims to allow for a circumstance where there is intelligence to suggest that a particular suspect is using a certain technology.

Conclusion

The Act was subject to significant debate and criticism during its passage through the legislative process, from a variety of sources. Although it was originally framed as aiming to combat things like terrorism and child pornography, the relatively low threshold for what constitutes a "serious offence", and the very broad reach of what is "reasonable and proportionate" has raised significant concern about privacies. Apple, for example, observed in its submission that the Act may allow for a directive that it give access to a consumer's heart rate or medical data (if stored in its "Health" app) to monitor drug use.

Additionally, providers were extremely concerned that the Act could serve to reduce the protection on consumer's data. A number of submissions observed that a notice requiring a "trap door" or similar in technology will make the risk of a leak or cyber-attack much greater. There are also economic concerns arising from the Act, given that it may encourage both technology professionals and technology start-ups to view Australia as a restrictive and difficult environment in which to settle.

Companies that either market, or use, encrypted messaging services in Australia should be aware of the increased powers that security and intelligence agencies in Australia have and exercise caution appropriately.

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