

**COMMENTS ON DRAFT DECREE ON COOPERATION AND INVESTMENT
IN EDUCATION WITH FOREIGN PARTNERS**
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Mayer Brown JSM would like to take the pleasure of this opportunity to contribute our comments on draft decree on cooperation and investment in education with foreign partners (“**Draft Decree**”).

A. Overview

We highly appreciate this Draft Decree for the purpose of creating a more perfect legal framework and complying with Vietnam’s commitments on education and training to the World Trade Organization.

B. Detailed Comments

Our comments shall be focused on each group of issues mainly in respect of the forms of cooperation and investment, formalities and procedures to establish and operate foreign-invested educational institutions, therefore, we do not go into the details of every article of the Draft Decree except for any wordings to clarify its meaning as we deem necessary.

1. Legal Basis for Preparing the Draft Decree

We are of the view that the Law on Enterprises dated 29 November 2005 should be supplemented for the reasons to be given hereunder.

2. Forms of Partnership and Investment

Issue:

Article 4 sets forth (i) forms of education-related partnership with a foreign entity (Article 4.1); and (ii) forms of investment (Article 4.2); (iii) foreign representative offices (Article 4.3)

Article 4.2 provides three categories of investment:

- a) An educational institution wholly-owned by a foreign investor, including newly established institutions or branches of foreign educational institutions in Vietnam;*
- b) A joint-venture educational institution between domestic and foreign investors;*
- c) Preschool and primary educational institutions wholly-owned by domestic investors, offering an international programs to children of foreigners, Vietnamese residing abroad and local children in need.*

In our opinion, the Draft Decree does not provide the criteria for categorising investment:

+ With regard to categories (a) and (b), the categories of investment which are determined by the capital contribution of foreign investors to establish and manage educational institutions are in accordance with the regulations of the Law on Investment;

+ In respect of category (c), the Draft Decree based on the application of an international program to preschool and primary educational institutions wholly-owned by domestic investors and the children of foreigners to define as the foreign investment

is contrast with the regulations of the Law on Investment¹, therefore we think that this is not a form of foreign investment.

Although the Draft Decree permits the foreign investors to carry out the direct investment under the two categories set out in Article 4.2 (a) and (b), it does not defined legal entities of the educational institutions in which the investors are allowed to establish. We have gone through a number of regulations in relation to the operation management by Management Board, minutes of general shareholders' meeting, the captial contribution and transfer, etc to be provided in some Articles of this Draft Decree, and we understand that the Drafting Team implicates that all foreign-invested educational institutions must be established in one of three forms of enterprises (i) one member liability limited company in respect of the category as stated in Article 4(2.a); (ii) limited liability company with more than two members; or joint stock company in respect of the category as stated in Article 4(2.b).

Article 4(3): In our opinion, Representative office should not be considered as the form of partnership, investment as set forth in Article 4 because its function is very different and not accordance with the Law on Investment.

Proposal:

Article 4(2.c) should be deleted if the criteria of capital contribution from foreign investors is based on to detemine the forms of invesment;

Article 4(2.c) should be incorporated with Article 4(1) as it is in the nature of the form of partnership for the application of the teaching program to foreign educational institutions;

The determination of the establishment and operation of a foreign-invested educational institutions shall comply with the Law on Enterprises and the Law on Investment.

3. Types of Educational Entities to be Allowed to Establish

Issue:

Article 13 stipulates 5 types of training institutions including two types of short-term foreign-invested training institutions but does not mention that how long is the short term?

Proposal:

It is necessary to express clearly the short-term if it is used to categorise the short-term training institutions.

4. Formalities and Procedures for Establishment

Issue:

Article 15 specified the procedures for establishment of each category of educational institutions:

Article 15(1) provides 4 steps to license the establishment of universities, junior colleges and occupational junior colleges:

a) Approval in principle the establishment of the educational institution;

¹ Pursuant to Article 3(12) of the Law on Investment, "foreign investment means the transfer of lawful capital in cash or other assets of a foreign into Vietnam in order to carry out the investment activity" and Article 3(13) "domestic investment means the disbursement of lawful capital in cash or other assets of a domestic investor in order to carry out the investment activity in Vietnam".

- b) Issuance of investment certificate;
- c) Issuance of decision for establishment of the educational institution; and
- d) Issuance of qualifying certificate.

The regulations on the procedures to license investment certificate and decision for establishment of the educational institution as stated in (b) and (c) above are not in accordance with Article 50 of the Law on Investment².

Jurisdiction for investment certification and Decision-making competence for the foreign-invested educational institutions as stated in Article 27 and Article 31 respectively herein are not in accordance with the regulations of the Law on Investment and the Law on Enterprises, concurrently the Drafting Team provides many regulations on procedures and competent authorities to license the establishment of foreign-invested educational institutions that may not comply with the spirit of administrative reforms of the Vietnamese Communist Party and Government.

Article 31 stipulates the decision-making competence for the establishment:

1. *The Prime Minister grants permission for the establishment of foreign invested Universities;*
2. *The Minister of MOET grants permission for establishment of foreign invested Colleges.*
3. *The Minister of MOLISA grants permission for establishment of foreign invested vocational colleges;*
4. *The Chairpersons of provincial People's Committees grant permission for establishment of foreign invested short-time training institutions, pre-schools, primary and secondary education institutions and vocational training institutions (excluding vocational colleges)."*

We think that pursuant to Article 50(1) of the Law on Investment "the Investment certificate shall also be the business registration certificate". The Prime Minister, the Ministers of Education and Training, Labor, Invalids and Social Affairs have authorities over the approval in principle of the establishment of foreign invested universities, junior colleges and occupational junior colleges before investors file the application to issue the Investment certificate as set out in Article 23 of this Draft Decree. Therefore, should the foreign investors be required to prepare further documents for submission to the Prime Minister and the Ministers of Education and Training, Labor, Invalids and Social Affairs and the Chairmen of Provincial People's Committees to make Decision on the establishment of foreign-invested educational institution? Further, what are differences in content between the Investment certificate and Decision on the permission of establishment?

Article 27 of the Draft Decree set forth "Jurisdiction for investment certification is subject to provisions of the Investment Law and relevant legislations". As our understanding that pursuant to Article 40 of the Law on Investment, application dossier receiving authorities including (i) the Department of Planning and Investment receives the investment projects which are implemented in the locality; (ii) the Management

² Article 50(1) of the Law on Investment set out "foreign investors investing in Vietnam for the first time must have an investment project and perform the procedures for investment in order to be issued with the Investment certificate. The Investment certificate shall also be the business registration certificate". In addition, Article 50(2) of the Law on Investment stipulated "an economic organisation with foreign invested capital which has been established in Vietnam has a new investment project, it shall be conduct procedures to implement such investment project without requirements to establish a new economic organisation".

Board receives the investment projects which are implemented in industrial zones, processing zones and hi-tech areas and economic zones.

Pursuant to Article 16 of this Draft Decree, however, application dossier receiving authorities shall request approval in principle of permission for investment and establishment; application for establishment, partition, segregation, acquisition and merger; application for opening of branches and application for registering university educational institutions as follows:

“The Ministry of Education and Training shall receive application for registering university educational institutions;

The Ministry of Labor – Invalids – Social Affairs shall receive application for registering occupational junior colleges;

The Department of Education and Training shall receive application for registering short-term educational institutions, preschool institutions, primary educational institutions and professional secondary schools;

The Department of Labor – Invalids – Social affairs shall receive application for registering vocational training centers and occupational secondary schools. (Together “Educational Management Authorities”)

The inconsistency of these regulations will make confuse to comply with the legislations on the formalities and procedures for the issuance of certificate. We understand that pursuant to the Law on Foreign Investment and Law on Enterprises, the Departments of Planning and Investment under Provincial People’s Committees (and Management Board of industrial zones, processing zones and economic zones) have authorities to issue the Investment certificate. However, this Draft Decree stipulates 4 competent authorities for such issuance. Is it necessary to decentralize? In our opinion, the education is specialised activity so it may need the professional management of the Ministry of Education and Training (and its other specialized entities) but also the investment in education by establishing foreign-invested educational institutions is the form of earning benefit. The establishment and operation of management and executive boards, the rights and interests of the owners, the directors or shareholders, capital contributors to establish such educational institutions are subject to the Law on Enterprises as it is in the nature of a enterprise. We believe that Educational Management Authorities have sufficient ability to supervise conditions of educational activities, but we also wonder whether they have sufficient capability to control the establishment and changes in content of Investment certificates as well as the transfer of owners, charter capital, etc.. from foreign-invested institutions?

Proposal:

Option 1:

- (i) The Law on Education does not mention any provisions on the establishment and operation of foreign-invested educational institutions, therefore, we think that for avoidance of overlap of the legislation, it is necessary to emphasize in this Draft Decree that the regulations applicable to the establishment and operation of foreign-related educational institutions shall comply with those of the Law on Enterprises and the Law on Investment.
- (ii) To monitor easier the formalities, procedures and conditions for the establishment of educational institutions, we suggest that the regulations related to procedures for

the establishment of educational institutions and application dossier receiving authorities as set out in Article 15 and Article 16 respectively should be moved to Section II, Chapter III and all regulations of Section III, Chapter II should be converted to Section IV, Chapter II.

- (iii) The regulations on formalities and procedures for Decision to license the establishment should be deleted. Therefore, such procedures shall only take 3 steps as follows:
- a) Approval in principle the establishment of the educational institution;
 - b) Issuance of investment certificate;
 - c) Issuance of qualifying certificate.

Therefore, educational projects without approval in principle the establishment of the educational institution shall need to obtain approvals from two competent authorities for the establishment of foreign-invested educational institutions:

- + First, the Departments of Planning and Investment under Provincial People's Committees are competent authorities to issue Investment certificate to the foreign-invested educational institutions.
- + Secondly, the Minister of Education and Training/Directors of Education and Training Departments and the Minister of Labor – Invalids – Social Affairs/Directors of Labor – Invalids – Social Affairs Departments are competent authorities to license qualifying certificate;

In the light of the above, the investors and foreign-invested educational institutions can recognise the appropriate competent authorities to resolve the issues in relation to the establishment, capital contribution, capital transfer, management and operation of educational institutions or teaching program, enrollment, issuance of graduation degree or certificate, etc... These enable the relevant competent authorities to determine their authorities to settle any issues in respect of foreign-invested educational institutions.

Option 2:

- (i) Article 27 should be deleted and associated with the Educational Management Authorities in terms of the issuance of certificate to educational institutions. Therefore, the Decision to license the establishment of educational institutions can be removed in the procedures.

The Drafting Team, however, should deliberate the ability of enterprise management of these educational institutions as mentioned above.

5. Operations Termination, Dissolvent, Separation, Liquidation of Foreign Invested Education Institutions

Issue:

Article 46(2) of the Draft Decree stipulates that “foreign- invested educational institutions shall terminate operations and subject to dissolvent in following cases:

- a) Pursuant to decision of state management authority on education or judgment or decision of the Court or Arbitration due to serious violation of the laws.
- b) Beyond the recruitment termination timeline and the cause to recruitment termination has not been addressed.
- c) Investor's will;

Article 46(3) provides that “The authority granting establishment permit for the foreign-invested educational institutions shall be authorized to decide for termination of operation and dissolution of such institutions”

We are of the view that:

- If Article 15 (1) keeps intact, the foreign-invested institutions shall maintain two kinds of certificates during their operation terms: (i) Investment certificate; and (ii) Decision to license the establishment of educational institutions. And pursuant to Article 46(3), whether the Investment certificate can have validity in the event that the Decision to license the establishment is invalid?
- The circumstances set out in Article 46(2) are not in accordance with Article 157 of the Law on Enterprises³ and the authority of courts under the Court Law and arbitration under the Ordinance on Commercial Arbitration.
- This Draft Decree does not provide circumstances of revocation of the Investment certificate/ or Decision to license the establishment.

Proposal:

- (i) The Drafting Team should refer to Article 157 of the Law on Enterprises to add the circumstances of operation termination and dissolution of enterprises.
- (ii) It is necessary to set forth the circumstances of revocation of the Investment certificate and or Decision to license the establishment.

6. Conditions for Establishment of Educational Institutions

Issue:

Article 18 of this Draft Decree regulates the investment capital for each categories of educational institution in which the Drafting Team requires educational institutions to secure a minimum amount of investment capital as follows:

1. *An investment project to set up a preschool institution must secure a minimum per capita investment of USD1,000/child (not including land use rights costs). The number of children used in calculations is the number of children attending the institution at the final investment stage of the project. The investment capital plan must be compatible with the estimated scale of individual stages.*
2. *An investment project to set up a general educational institution must secure a minimum per capita investment of USD2,500/child and a minimum investment capital of USD2,500,000.*
3. *An investment project to set up a short-term training facility or occupational center must secure a minimum per capita investment of USD700/student (not including land use rights costs). The number of students used in calculations is the average number of students for the entire amount of time to date at the final investment stage of the project.*

³ Article 37 of the Law on Enterprise stipulated the circumstances and conditions for dissolution of enterprises as follows:
“a) Expiry of Operation Terms as stated in the Charter without any renewal of the company;
b) Pursuant to a decisions made by a sole proprietor; all general partners, or the Members’ Council, the company owner or Shareholders’ Meeting;
c) Minimum number of members of the company is lower than that required by this law for six consecutive months;
d) Revocation of the certificate of business registration.”

4. *An investment project to set up an occupational center must secure a minimum per capita investment of USD3,000/student. The number of students used in calculations is the average number of students for the entire amount of time to date at the final investment stage of the project.*
5. *An investment project to set up an occupational institution (except for occupational centers) must secure a minimum per capita investment of USD5,000/student and a minimum investment capital of USD10,000,000.*
6. *An investment project to set up a higher education institution (or affiliates of foreign colleges or universities in Vietnam) must secure a minimum per capita investment of USD7,500/student and a minimum investment capital of USD15,000,000.*
7. *An investment project to open a branch of an educational institution which has been licensed in Vietnam must have a per capita investment and a minimum investment capital as specified in Item 2,4,5 of this Article.*
8. *For foreign-related educational institutions which have no newly constructed facilities and only leased premises or those contributed as a Vietnamese partner's stake from its available facilities must secure a minimum investment of 60% of the rates defined in paragraphs 1, 2, 3, 4 and 5 of this Article.*

With respect to some professions, pursuant to the Law on Enterprises, the investors must secure a certain legal capital upon the establishment⁴, however, the investors are not required to secure any minimum amount of capital in accordance with the regulations of the Law on Investment. Therefore, the requirements of Article 18 that educational institutions must secure a certain minimum amount of capital as stated in are contrast with those of the Law on Investment.

Proposal:

The Drafting Team should use the term “*legal capital*” instead of “*minimum investment capital*” to express that the investors must secure a minimum amount of capital to ensure the establishment of foreign-invested educational institutions in respect of capital conditions to comply with the regulations of the Law on Enterprises and the Law on Investment, etc...

7. Qualification of Teachers

Issue:

Article 22 provides a range of qualifications for the teachers of foreign-invested educational institutions, however, it does not require the teaching experiences as being applicable to the joint training program.

Proposal:

The requirements for qualifications of the teachers of foreign-invested educational institutions should be added, especially foreign teachers must have 5 year teaching experiences and their qualifications must be recognized by the Ministry of Education and Training in accordance with Vietnam's commitments to World Trade Organization.

⁴ Article 4(7) of the Law on Enterprises set forth “legal capital means the minimum amount of capital that is required by law for an enterprise to be establish”. Pursuant to Article 3 of the Law on Investment, “invested capital means the money and other assets used to investment activity either in the form of direct investment or indirect investment”