

NEW REGULATIONS ON ESTABLISHMENT, REORGANIZATION, CONVERSION AND TRANSFER OF ENTERPRISES WHOLLY OWNED BY THE STATE

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On April 5, 2022, the Government issued Decree 23/2022/ND-CP on the establishment, rearrangement, conversion and transfer of the right to represent the owners at enterprises wholly owned by the State (**Decree 23**). The Decree will take effect from June 1, 2022, replacing Decree 172/2013/ND-CP (**Decree 172**), Decree 128/2014/ND-CP (**Decree 128**) and abolishing Decree 69/2014/ND-CP. Some typical changes of Decree 23 compared with the previous Decrees are as follows:

Firstly, supplementing regulations related to the conditions and procedures for establishing enterprises with 100% charter capital held by the State. Accordingly, enterprises with 100% charter capital held by the State shall only be considered for establishment when they fully satisfy the following conditions:

- Having operation business lines or fields within the scope of state capital investment for enterprise establishment in accordance with the laws on management and utilization of state capital invested in enterprises' manufacturing and business activities;
- Ensuring sufficient charter capital as specified in Article 5 of Decree 23;
- Having valid dossier as specified in Article 6 of Decree 23;
- The enterprise establishment being consistent with the national socio-economic development strategy and plan, and the national industry planning.

For enterprises established under decision of the Prime Minister, Decree 23 supplements the condition to collect opinions of the Ministry of Justice and the governing ministry. For enterprises established by the decision of the owner's representative agency, the Ministry of Planning and Investment will be the appraisal agency and assume the prime responsibility for collecting opinions of ministries and managing agencies instead of the Ministry, provincial People's Committee as stipulated in Decree 172.

Secondly, amending and supplementing regulations on rearrangement of enterprises wholly owned by the State. According to Decree 23, the forms of rearrangement include: consolidation, merger, division, separation and dissolution of enterprises with 100% charter capital held by the State. Thus, compared with Decree 172, the rearrangement of enterprises does not include the form of conversion into a joint stock company (because the equitization of state-owned enterprises has been separately regulated in Decree 126/2017/ND-CP) and the form of conversion into a parent - subsidiary company. The following is some changes of this content:

(i) Amending and supplementing the conditions and procedures for consolidation, merger, division, separation and clearly stipulating the policies for employees and persons holding leadership and management positions in each case. Decree 23 supplements the condition that "*consolidation, merger of enterprises must comply with the Law on Competition regarding consolidation, merger of enterprises*" and removes the condition "*the reorganization does not reduce the charter capital of a single-member limited liability company*". Regarding the procedure of consolidation, merger, division and separation of enterprises established by the Prime Minister's decision, compared with Decree 172, Decree 23 supplements the Ministry of Justice, governing ministry and related agencies as the agencies to be consulted (if necessary). At the same time, Decree 23 clearly stipulates the policies for employees and persons holding leadership and management positions in each case of consolidation, merger, division or separation of enterprises.

(ii) Stipulating more specifically financial responsibilities of enterprises when temporarily ceasing their business.

(iii) Supplementing regulations on suspension of operation, termination of business of enterprises wholly owned by the State in compliance with new

regulations of the Law on Enterprises 2020.

(iv) Supplementing the condition that *"the enterprise is not in the process of settling disputes at court or arbitration"*, responsibilities of the managers for enterprises' debts in the event of dissolution.

Thirdly, amending and supplementing regulations on the sale of the whole enterprises with 100% charter capital held by the State. Decree 23 has revised some contents related to documents included in the plan to sell the whole of an enterprise compared with the provisions of Decree 128, typically supplementing *"the managing enterprise's plan for land use in accordance with the laws on land, laws on rearrangement and handling of state-owned houses and land from time to time, which has been approved by competent state agency"* in the component of the plan for selling the whole enterprise; requiring to clearly define *"the method, form and time of enterprise value determination"* instead of only requiring to *"determine enterprise value"* as specified in Decree 128.

Compared with Decree 128, Decree 23 has simplified internal responsibilities in the transferred enterprises, but also stipulates some additional responsibilities such as coordination in appraisal, agreement on documents and data between the parties involved. Decree 23 also removes the provisions on calculating severance allowance in Decree 128 and only keeps the provisions on employees continuing to work under new labor contracts.

Fourthly, amending the regulations on transfer of the right to act as the owner's representative in enterprises wholly owned by the State. Decree 23 has removed the form of transferring enterprises to the collective employees as specified in Decree 128. At the same time, according to Decree 23, the Owner's representative agency (Ministry, ministerial-level agency, agency under Government; provincial People's Committee) will replace the role of the Enterprise Innovation and Development Board as specified in Decree 128. Decree 23 also amends one of the three conditions for transfer among the Owner's representative agencies: *"The business, production lines of the transferred enterprise are **suitable** to the industry, field or management objectives of the Owner's representative agencies receiving the transfer"*, while Decree 128 stipulates that *"Being an enterprise operating in the **main***

business lines or fields or closely related to the main business lines or fields of the economic groups, corporations, groups of companies receiving the transfer".

COMMENTS AND RECOMMENDATIONS

Compared with the previous decrees, Decree 23 has many changes in regulations on the establishment, rearrangement, ownership conversion, transfer of the right to act as the representative of state ownership in the enterprises of which 100% of the charter capital is held by the State.

Therefore, enterprises wholly owned by the State that are in the process of being rearranged, sold, converted or transferred of the right to act as the owner's representative need to promptly update the changes in Decree 23 and at the same time, pay attention to the relevant provisions referred to, such as Law on Enterprises 2020, Law on Management and Utilization of state capital invested in enterprises' manufacturing and business activities 2014, Law on Property Auction 2016.

