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“Article 4, Item 22 is a linkage between the Law on Enterprises 2005 and the existing legal system applicable to SOEs”

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INVESTMENT IN STATE-OWNED ENTERPRISES STILL RISKY

Nguyen Ngoc Bich J.D



The Law on State-owned Enterprises 2003 has been abolished but a legal framework for state-owned enterprises still exists

The replacement of the Law on State-owned Enterprises 2003 (“LSE 2003”) by the Law on Enterprises 2005 has created a common belief that the legal framework that once was only applicable to state-owned enterprises (“SOEs”) ceased to exist and a “level playing field” has been created for enterprises of all economic sectors.

However, a careful look on the Law on Enterprises 2005 shows that a separate legal framework for SOEs does exist. In other words, there is no longer a LSE but its spirit is still there.

Article 4, Item 22 of the Law on Enterprises 2005 stipulates that: “A state-owned enterprise is an enterprise in which the State has more than 50% of its chartered capital.” However, in this law there is almost nothing regulating such SOEs except a provision in Article 166 on SOEs in transition.

So, the issue is what Article 4, Item 22 means?

There are two different opinions on this article.

People of the first opinion think that this Article 4, Item 22 is redundant and overlapped with other provisions in the Law on Enterprises.

They think that a SOE is established under the form of either a joint stock company or a limited liability company. For that reason, that company shall be governed by the Law on Enterprises. In other words, the Law on Enterprises governs all forms of enterprises regardless the form of establishment.

People of the second opinion say that Article 4, Item 22 is a linkage between the Law on Enterprises and the system of existing legal instruments governing SOEs. People of this opinion think that the LSE is just a component (although an important one) of the legal system that governs SOEs. Therefore, that system still exists despite the abolition of the LSE.

Article 4, Item 22, the Law on Enterprises 2005:

“A state-owned enterprise is an enterprise in which the State has more than 50% of its chartered capital.”

“Investment in SOEs is not easier”

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We agree with the second opinion. Prior to July 1, 2006 – the day that LSE was abolished, the SOEs had been governed by this law and many other legal instruments (for example, the regulations on employee salary in SOEs and procurement). The application of these regulations is compulsory to SOEs and optional to enterprises of other economic sectors.

The Law on Enterprises only replaces the LSE but other legal regulations such as the Law on Procurement, the regulations on investment of SOEs remain valid. As the Law on Enterprises does not abolish the concept of “SOEs”, such SOEs are still subject to the legal instruments governing SOEs as they were before the abolition of the LSE.

Hence, although the LSE has been abolished (with an exception in case of SOEs are in transition which is provided in Article 166 of the Law on Enterprises 2005), SOEs still exists and are treated by law differently from enterprises of other economic sectors.

“Investment in SOEs is not easier”

Corporate governance is one of the issues that cause investors hesitant to invest in SOEs. In accordance with the Law on Enterprises 2005, the highest authority of a company is the shareholders’ congress (in joint stock company) or the board of company members (in limited liability company). Nevertheless, in SOEs, new investment projects shall be approved by both the shareholder’s congress (or the board of company shareholders) and a competent state agency (Article 58, Item 1, Decree 108/2006/NĐ-CP). This means that SOEs are not absolutely independent in making decisions as private enterprises.

Additionally, a number of regulations applicable to SOEs are different from those applicable to private enterprises. For example, the time limit for tax clearing with tax authority is 30 days in the case of SOEs while it is 90 days in the case of private enterprises.

Different application of the law based on the nature of ownership undermines the concept of a “level playing field” for all enterprises. The existence of a legal framework specially applicable to SOEs also makes those enterprises less attractive to investors.

Although the Law on State-owned Enterprises 2003 has been abolished, but SOEs still exists and are subject to a legal framework that are different from the legal framework of private enterprises.