

# Luther.



## Luther Newsletter I Vietnam

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# Content

■ EDITORIAL

■ FOCUS

Employment & labour ..... 4

■ FDI FYI

New Decree elaborating the Law on Cybersecurity ..... 6

New Regulation restructuring wage payment schemes and benefits ..... 8

A New Regimen of Trademark Protection ..... 9

Producing Zones and Processing Companies ..... 11

■ GENEREAL INFORMATION

About us..... 13

Our locations..... 14

Authors of this issue ..... 15

Events, publications and blog..... 16

■ EDITORIAL

Dear reader,

with its fast recovery from the Covid-19 crisis, bustling with life anew, Vietnam has come around as one of the most promising economies for a China +1-2-3... world. Vietnam has proven itself as a resilient, innovative, and agile business location. Its proximity to strategic markets like Thailand, Malaysia and Myanmar and its public policy to position on eye-level with China as production site make it a fruitful up-and-coming candidate for those seeking diversification and expansion.

With offices in Singapore, Malaysia, Thailand, Indonesia, Myanmar, India and China, Luther is present in the most important markets in Asia from where we support and advise our clients regarding their investments and businesses throughout Asia and offer a truly Pan-Asian perspective. Based in Deutsches Haus in Ho Chi Minh's CBD we focus on enabling our clients' market entry, compliant business operations as well as growth and expansion into adjacent markets.

With our all-new newsletter, we would like to inform you as someone participating in this exciting growth, someone who is contemplating to invest in Vietnam or simply as someone interested in this growing market. This newsletter will be about upcoming laws and regulations as well as other relevant legal and tax related developments. In this first edition we will focus on raised regional minimum wages, new regulations for insurance businesses, the latest cybersecurity regulation and the new regime for trademark protection in Vietnam. We are always happy to receive your input and feedback under our email [vietnam@luther-law-firm.com](mailto:vietnam@luther-law-firm.com).

Let's get in touch!

Sincerely yours



Martin Seybold

Ho Chi Minh City, October 2022

## ■ FOCUS

## Employment & labour



The Vietnamese Government by means of Decree 38/2022/CP has raised the regional minimum wages. This Decree has been effective since 1 July 2022 with the following minimum wage provisions:

Region	Minimum monthly wage		Minimum hourly wage	
	VND	USD equivalent	VND	USD equivalent
I	4,680,000	199	22,500	0.96
II	4,160,000	177	20,000	0.85
III	3,640,000	155	17,500	0.74
IV	3,250,000	138	15,600	0.66

You may need to revise your current labor contracts and payroll to meet the new minimum wages in your region.

## ■ FDI FYI

This section is reserved to provide you with relevant changes in the regulatory framework for your current and future foreign direct investments in Vietnam. As naturally the legal landscape is vast, always feel free to approach us with your questions.

# Insurance Business now open to broader FDI

The Vietnamese National Assembly recently passed the new Insurance Business Law 2022 to regulate insurance businesses. It will take effect on 1 January 2023 and introduce online sales and temporary insurance and ancillary services. The Insurance Business Law 2022 is much clearer than the current law on insurance businesses. But most importantly for us, it opens a highly regulated business line to broader foreign engagement.



- Under the new law, an insurance company based in Vietnam can select to provide:
  - life insurance and healthcare insurance; or
  - non-life insurance and healthcare insurance with a term up to one year; or
  - healthcare insurance.
- Though there was no limitation on the foreign ownership ratio in a Vietnamese insurance company, factual accessibility of the insurance business line was highly restricted to insurance companies. This has been loosened up to reward Vietnam's current WTO commitments. Hence, foreign investors of certain qualification may now establish 100% subsidiaries in this business line which was previously closed off to them. A FDI commercial presence may be established as
  - (i.) a representative office,
  - (ii.) an independent Vietnamese insurance entity,
  - (iii.) a dependent offshore non-life insurer branch.
- Purchasing 100% capital or shares of an existing Vietnamese insurance company is also allowed and therefore a possible option for foreign investors.

However, the insurance business is still considered a conditional business line under Vietnamese investment laws and regulations, where the law previously restricted access to foreign insurance companies, reinsurance companies, it now includes financial institutions with own subsidiaries doing insurance business ("offshore financial and insurance group") to engage in insurance business or purchase capital/shares of an existing insurance company in Vietnam, hence being admitted as foreign investor.

Offshore financial and insurance group companies are also allowed to set up a reinsurance company to do reinsurance business in Vietnam.

As with other representative offices in Vietnam, a foreign insurer's representative office is not permitted to engage in operational insurance business. Instead, basically only liaising functions, market research and investment promotion can be conducted through such a representative office.

An insurance company in Vietnam formed as a limited liability company or joint stock company must meet certain requirements. E.g. an insurance joint stock company is required to have at least two institutional shareholders, each shareholder shall hold at least ten per cent of charter capital and no individual shareholder may hold more than ten per cent of charter capital.

The Vietnamese Ministry of Finance has the competence and powers to finally decide about the establishment of a foreign insurer, and to approve capital or share purchase transactions of an insurance company in Vietnam.

With its high density and complex regulation and many open points even under the new law, this remains an interesting field that we curiously observe for future trends and opportunities.

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## **New Decree elaborating the Law on Cybersecurity**

**When the Cybersecurity Law 2018 came into force at the beginning of 2019, it mainly related to the data localisation regime. This has been put on the table by Vietnamese legislators because of its impacts on cybersecurity and related compliance issues.**



The Cybersecurity Law 2018 authorised the Government to promulgate guidelines for enforcement of the legal regulations, and the draft Decree for implementing the Cybersecurity Law had been released for public consultation previously. However, the draft Decree has been waiting for its enactment for years and was just passed by the Government as of 15 August 2022. Decree 53/2022/ND-CP detailing a number of articles of Cybersecurity Law ("Decree 53") with the effective date on 1 October 2022 regulates some controversial issues related to data localisation.

### **1. Data Localisation Regime**

Data localisation requirements had been introduced previously in a Decree guiding the laws on information technology, telecommunications, and the press in 2013, and then legislated in the Cybersecurity Law 2018. However, the relevant legal provisions in these regulations were not enforced, remained vague and required further clarification for implementation. These concerns about the data localisation requirements are now clarified by Decree 53.

Data localisation is a legal concept referring to the requirement for data to be stored within a specific territory. Like in other Asian countries, Vietnam's legislators have the tendency to protect the data originated from Vietnam with a focus on national security and data privacy when cross-border data transfers occur. For this reason, the Vietnamese legislators set out the data localisation regime with extraterritorial application covering onshore and offshore businesses. While all onshore business entities must comply with the data compliance framework without exception, offshore business entities are obliged to fulfil the obligations imposed by such requirements only when their data and the business they operate are classified as specific categories of data and business sectors under Decree 53.

#### **a. Categories of data subject to data localisation requirements**

- Personal data of service users in Vietnam:
  - Data generated by service users, which relates to account name of service users, duration of use of services, credit card information, email address, IP addresses for the latest login and logout, registered telephone number associated to the account or data; or
  - Data on the relationships of service users in Vietnam, including “friends” and groups with which the users connect or interact.

#### **b. Business sectors**

- Ten business sectors are subject to data localisation requirements:
  - Telecommunication services
  - Storing and sharing data in cyberspace
  - Domain name providers
  - E-commerce
  - Online payment
  - Payment intermediary service providers
  - Providers of transport connection services
  - Social networks and social media
  - Online video game providers
  - Providers managing/operating other information online in form of messages, voice/video calls, e-mail and chat.

## **2. Establishment of a commercial presence in Vietnam**

One of the ambiguous regulations provided in the Cybersecurity Law 2018, which raised concerns of foreign stakeholders in the tech industry, is the requirement on incorporation of a commercial presence in Vietnam. The Cybersecurity Law 2018 only mandates that foreign businesses which operate in

specific service sectors and collect, deploy, analyse, process categories of data as mentioned above, must set up a commercial presence in Vietnam by means of a representative office(s) or branch(es). The lack of clarity of this provision has left it unenforced until now.

It is noteworthy that, under Decree 53, foreign businesses will encounter the obligation to incorporate local commercial presence only when certain events prescribed in Decree 53 occur. In this case however, the foreign business is forced to set up its local representative office(s) or branch(es).

Notably, both obligations on data localisation and incorporation of a local commercial presence are only imposed upon foreign businesses in accordance with a written decision of the Public Security Ministry of Vietnam and are required to be fulfilled within 12 months starting from the date of such decision.

## **3. Period of data storage & term of operation**

Under Decree 53, the term of operation of (a) representative office(s) or branch(es) in Vietnam shall be extended to the point of time when the foreign business no longer operates its business or provides the relevant forgoing services in Vietnam. The minimum period of data storage is within 24 months as of the date of receipt of the request for data storage.

## **4. Reservation of measures adopted for Cybersecurity Purposes**

Though most systems and services of tech companies are developed for commercial purposes and do not fall under the category of national security information systems, the risk of it being used by users to disseminate illegal and unfaithful information prejudicing national security, social order or legitimate interests of other parties is still a main security concern.

The state authorities at their discretion shall adopt certain measures, such as requesting service providers to censor illegal and unfaithful information, collecting data, suspending or terminating the operation of information systems. Details about the orders and procedures for implementation of such measures are stipulated in Decree 53.

## **5. What you should do**

It is advisable to be well aware of the possible legal implications of the Vietnamese legal framework on data protection for your business. To **prepare** for a data localisation strategy,



your business should tailor a plan to meet statutory requirements. To **avoid** being exposed to the risk of non-compliance, your policy in terms of data security should be under scrutiny when facing different approaches from your domestic regulation.

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## New Regulation restructuring wage payment schemes and benefits

The Vietnamese Government has recently issued Decree 38/2022/CP on regional minimum wages ("Decree 38"). Thereby, the requirement to pay at least a seven per cent higher salary than the regulatory minimum wage for trained workers has been removed.



Decree 38 may in certain cases decrease benefits already granted to employees the Vietnam Labor. The Ministry of General Confederation and Labor, War Invalid and Social Affairs, by its Letter No. 2086/BLĐTBXH-TLĐLĐVN, dated 17 June 2022, requires which benefits for employees under existing agreements, that are better than in this new Decree, must remain in force. Any removal or reduction can be applied only in case the employee and all other involved parties, including but not limited to trade union, have reached a mutual agreement.

Furthermore, the new Decree states that at the employer's discretion, any payment method such as weekly salary, daily salary, or a salary based on production, or a lump sum salary can be converted to monthly payment or hourly payment by the following formula:

- (i.) Monthly payment
  - = weekly salary \* 52 / 12
  - = daily salary \* no. of normal working days within a month
  - = salary based on production / normal working hours within a month
  - = lump sum salary / normal working hours within a month.



- (ii.) Hourly payment
  - = weekly salary / normal working hours within a month
  - = weekly salary / normal working hours within a day
  - = salary based on product / normal working hours for such product
  - = lump sum salary / normal working hours for the work.

Please note that any agreement, where a monthly salary is lower than the minimum monthly wage, or where a weekly salary or daily salary or salary based on production or lump sum salary is lower than the minimum hourly wage, will be considered as violating this new Decree 38/2022/CP, with legal consequences.

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## A New Regimen of Trademark Protection

Vietnamese lawmakers attempt to harmonize their intellectual property (IP) protection regimen with the international legal instruments binding upon Vietnam, namely Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), European Union Vietnamese Free Trade Agreement (EVFTA) and Regional Comprehensive Economic Partnership (RCEP). In this context the Law No. 07/2022/QH15 on revision and supplementation of a number of articles of the Law on Intellectual Property (the “2022 Amended IP Law”) was enacted by the National Assembly of Vietnam on 16 June 2022.



The majority of the changes in the 2022 Amended IP Law aim to ensure Vietnam's compliance with its commitments made during its roadmap for integration with the global economy. In this article, we would like to shed some light on recent changes in the Vietnamese landscape of trademark protection with the hope that trademark holders can adapt their strategy on trademark protection new trends introduced in the 2022 Amended IP Law.

### 1. Eligibility for sound marks to be protected

In alignment with Vietnam's commitment in the CPTPP, this is the first time that Vietnamese legislation on IP protection rec-

ognises sound marks. To be protected as a trademark, the sound mark must be an audio sign shown in graphic form.

Meanwhile, at this point in time, Vietnam has not yet recognised scent marks (smell) as signs to be protected under its trademark registration system, although CPTPP encourages its contracting parties to protect such intangible signs, too.

## 2. Well-known trademarks

In comparison with relevant provisions in the prevailing IP Law, the 2022 Amended IP Law reinterprets well-known trademarks as marks that have become widely known by the relevant public in the territory of Vietnam, instead of to the consumers in general.

Notably, to conform with CPTPP provisions regarding the criteria used for determining if a trademark is well-known, the 2022 Amended IP Law revises the selection criteria. Only criteria which are likely to be relevant on a case-by-case basis will be selected for the determination of the “well-known status” of a trademark and replaced the recourse to all-inclusive criteria as required by the current IP Law. Accordingly, the criteria on the number of countries in which the mark is protected or recognised as a well-known trademark only serve as a reference for Vietnamese authorities.

## 3. Bad faith trademark registration

A bad faith trademark registration under the new law is a pre-emptive filing by an applicant who is not authorised by the legitimate right holder of an established trademark. The bad-faith registration by copycats is prevalent in Vietnam but prior to the enactment of the 2022 Amended IP Law victims whose rights were infringed due to bad faith registration were not sufficiently protected, as Vietnam lacked effective mechanisms for tackling such registrations.

As from the effective date of the 2022 Amended IP Law, there are certain administrative measures available to victims of bad faith registrations depending on the stage of Vietnamese trademark registration:

- **Opposition:** If a mark has not yet been granted, an opposition can be filed with the National Office of Intellectual Property (NOIP). The opposition must be filed with evidence sufficient to establish earlier rights within five months from the publication of the disputed mark.
- **Invalidation of trademark registration certificate:** If a bad

faith registration has been accepted by the NOIP, a written request for invalidation can be filed after the registration is granted.

- **Initiation of legal proceedings** before Vietnamese courts and request for suspension of the examination of bad faith application: If there is a petition of bad faith registration lodged with competent Vietnamese court, the court may suspend an examination.

## 4. Additional subject matters excluded from trademark protection

- **Three-dimensional marks (shape marks):** The shape which results from the nature of the goods themselves or necessary technology characteristics of the goods cannot be protected as a trademark. Also, a shape mark is deemed to be indistinctive if the normal shape of goods or partial goods or of packaging of goods, or of container of goods has been used regularly and widely recognised prior to its registration application.
- **Marks which give substantial value to the goods** shall be deemed to be indistinctive, save for the case where such marks can be distinctive through the course of usage prior to the date of the application.

## 5. Dual mechanism for trademark opposition

In parallel with the current mechanism for third parties to address their written opinion on the application registration under the current IP Law, the 2022 Amended IP Law introduces a new mechanism allowing oppositions to the application registration within the time limit as mentioned in Point 3 therein.

## 6. Reduction of the time limit

The waiting time from the expiration of a trademark to the time when a similar later mark can be registered is reduced from five to three years. By way of submission of a request for termination of the validity of the earlier expired trademark, the applicant of the later filed trademark may substantiate legal grounds for their registration.

We see significant and positive changes set out in the new legislation, but also some degree of vagueness. We will closely monitor the interpretation of the new regulations to help you navigate through the changes and uncertainties in

the Vietnamese legal landscape regarding protection of trademarks in particular and intellectual property protection in general.

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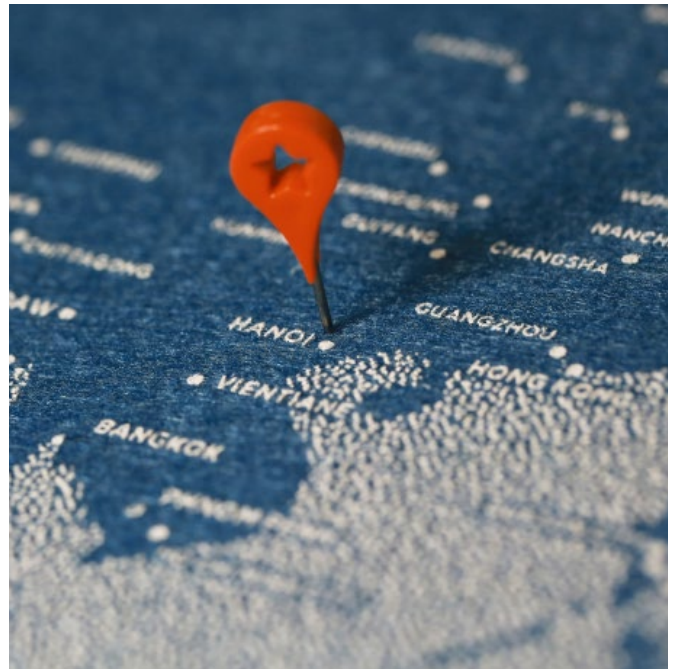
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## Producing Zones and Processing Companies

On July 15, 2022, Decree 35/2022/CP on industrial parks and economic zones administration took effect. According to this Decree, in Vietnam there shall be six types of industrial parks, and three types of economic zones, as specialised areas for production activities, and, if so required in combination with other related business activities.



The following types and terms are available under the new Law:

As for Industrial Parks:

- Industrial Park
- Processing Industrial Park
- Supporting Industrial Park
- Specialising Industrial Park
- Eco-industrial Park
- High-tech Industrial Park

As for Economic Zones:

- Coastal Economic Zone
- Border Economic Zone
- Specialising Economic Zone

Although the Decree states these different types of zones, in reality there is often a mixture of different zones or a specific type for some part of a more general type of zone.

Especially a common industrial park may have separate areas for manufacturing, processing, supporting industry, and other specialised industry. Also, within an economic zone, there may be certain different types of industrial parks.

An eco-industrial park is an industrial park in which production activities have to meet certain benchmarks for environmental protection. Enterprises in eco-industrial parks can be recognised as eco-enterprises. Provincial People's Committee will issue the certificate of eco-industrial park/eco-enterprise. Once recognised as such an eco-enterprise, investors can enjoy certain special incentives such as land rent, taxes, and loans with preferential interest rates from environmental protection funds.

Regarding so called "processing" enterprises: A company is considered as a processing enterprise in the event:

- It registers and conducts processing business within a processing industrial park or a processing area inside an industrial park or an economic zone; or
- It has been granted a processing enterprise certificate, or else an investment registration certificate in which processing as business purpose has been recognised.

Foreign investors can either register processing activities when registering its investment project, or at a later stage during implementation of the investment project in Vietnam, as a supplement. When they are certified as a processing enterprise, such a company is entitled to certain tax incentives. In general, an enterprise certified for processing purposes is allowed to:

- import material to manufacture the products and then export;
- export its products to the Vietnamese domestic market;
- do other businesses, provided that (i) accounting books for processing and these other businesses are separated and (ii) other businesses areas are divided from the processing area;
- lease customs bonded warehouses outside the industrial zone; and

- allow investors, staff, business partners to enter/exit from the area of the processing company.

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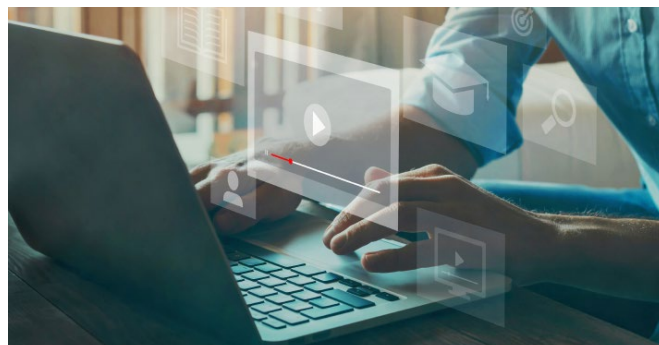


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### Learn from us:

**Webinar by AHK Competence Center for Agri- & Food economy & Luther's Johannes Klausch, 5 September 2022**



Johannes lead a par-force ride through the regulatory landscape of food imports on 5 September 2022. A great opportunity by the Competence Centre for Agri- and Food economy by the German Chamber of Commerce in Vietnam (AHK). The Webinar material is available upon request.



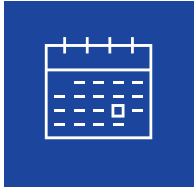


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# Events, publications and blog



You will find an overview of our events [here](#).



You will find a list of our current publications [here](#).



You will find our blog [here](#).

## Legal information

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