

The Businesses Law, passed by the National Assembly on June 12, 1999 will take effect from Jan. 1, 2000. This article is aimed at presenting some opinions about the making of delegated legislation needed for implementing the new law more properly.

The Businesses Law, inheriting most features and developed from the Companies Law and Private Businesses Law, deals with many matters not mentioned by the two said laws, such as:

- allowing all natural persons to form and put money in a business, that is, giving everybody chances to invest directly in companies;

- reforming procedures for forming a business and specifying what operations are forbidden or limited by law; and what operations requiring a fixed legal capital and



HOW WILL THE BUSINESSES LAW AFFECT ECONOMIC ACTIVITIES?

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licenses;

- allowing more forms of business to help investors choose and spread business risk;

- specifying rights and obligations of entities relating to the business;

- prescribing procedures for splitting, merging, acquiring businesses and changing the business form with a view to helping businesses expand their scope and operations.

Generally, the Businesses Law includes many progressive viewpoints. To ensure the law will produce intended results, however, many problems should be studied and clarified.

1. Reform in procedures for forming a business

The administrative reform in Vietnam today aims at simplifying procedures. Many people are even

of the opinion that the workload of the administrative machinery in controlling the socio-economic life could be reduced. However, the outcome of the simplification of procedures is what we should pay full attention to.

As everybody knows, all procedures and required documents should be based on regulations and rules set by law. In Vietnam, like other countries, the system of laws becomes more and more complicated as the society evolves. In Vietnam, particularly, the system of laws is imperfect, therefore, many laws should be made as soon as possible (while those in other countries have developed for hundreds of years) and moreover, a compromise between different opinions should be reached during the law-making process. Thus, could administrative procedures be

simplified in such a situation?

In addition, making laws and exploiting loopholes in the laws could never be separated. The stricter the laws, the more elaborate the violations. Suppose that all laws are made perfectly and strictly but administrative procedures are so simple that all violations become possible, then what do laws exist for? The situation in Vietnam seems more worrying because law-makers tend to make law simpler.

According to the Businesses Law, the applicant need only supply some information and register the company and needn't ask for formation license and deposit the pooled capital in a frozen account. It's worth noting that the Companies Law in force is nearly a copy of its counterparts in developed countries. Procedures for forming a company in those countries are complicated because law-makers know all kinds of violation too well.

For example, everybody is allowed to raise money from the public to form a company, but this act has no legal basis because there is no license to form a company granted by an authorized body. After raising money, the fund isn't required to be put in a frozen account, then what will ensure that the founder preserve the pooled capital until the day when the company comes into operation? Thus, the simplification of procedures is all right but how can the authorities prevent founders of company from embezzling the pooled capital?

Moreover, the Article 11 of the Businesses Law requires a "contract to form the company" from the

applicant although a copy of Articles of Association is included in the dossier placed in the related authority. In my opinion, the Articles of Association, in nature, is a contract between founders to form a company. The Foreign Investment Law requires two documents: a contract to form a joint venture, and Articles of Joint Venture. The Companies Law made it simpler: all founders have to sign the Articles of Association without making the contract to form the company beforehand. Now is it necessary to make this contract as required by the Businesses Law?

Companies Laws from Southeast Asian countries show that their procedures involve many stages:

(a) Getting approval for the name



of the company (like getting the permit allowing a company to be formed in Vietnam)

(b) After getting the permit, founders should submit the dossier including: a contract to form the company, the Articles of Association, information about its board of directors; managing director and auditor, the person who is authorized to sign on behalf of the company, documents about the pooled capital and other assets, the list of shareholders, declaration made by a lawyer certifying that the company is formed according to law (a Declaration of Compliance), license (for specific activities conditioned by law), and records of the meeting preparing for the formation of the company.

(c) The authorized body examines the dossier before issuing formation license or refusing to do it because

the dossier doesn't supply enough information. The authorized body should make an answer in writing within 10 days (in Singapore) or four weeks at most (in Malaysia and Thailand).

In this process, what is worth noting is the role of a lawyer: he deals with all complicated procedures, advises on company formation, sign the Declaration of Compliance and help the Registrar of Companies examine the dossier more exactly.

In short, the reform in administrative procedures should aim at rationalization and standardization rather than simplification.

2. How is fund raised?

In Vietnam, the concept of "fund raising" isn't clarified. It could be

considered as the work of borrowing money by some, or the work of forming capital by others. The fact is the concepts of "capital" and "loan" aren't well defined. Article 7 of the Businesses Law allows a business to choose "forms and ways of raising fund". Is this fund loan or capital? Studying many other articles of this law, we could see that articles regulating the fund raising work pay attention only to "ways of forming capital for a business". As for joint stock companies, they are allowed to borrow from the public by issuing shares. This permit isn't granted to partnership firms, limited companies and private businesses.

As for limited companies and private businesses, the act of raising fund from founders is regulated by many articles of the law. Noteworthy

points are as follows:

a. Founders or board of directors will evaluate assets pooled and bear responsibility for their evaluation by paying compensation in case of overestimate (Art. 23): The Article saves governmental bodies from a difficult task and forces companies officers to enhance their sense of responsibility. This principle could be applied to the evaluation of assets mortgaged to banks.

b. If the founder fails to pool enough money as required on time, the shortage will be considered as a debt owed to the company (Art. 27): This Article allows members to pay to the company by installments, and thus allowing small savers to invest in companies. However, the Article doesn't fix the time limit on these installments, as a result, there will be troubles when the company is declared bankrupt.

c. After pooling money as required, the member will be granted a certificate (Art. 27): This is a legal document, like the share certificate, stating part of pooled capital owned by the bearer. The Companies Law didn't deal with this problem with the result that a member has no proof of ownership to require the law to protect his interests.

(d) Members and shareholders can ask the company to buy back their shares if the company is solvent (Arts. 31 and 64): This is also a matter not mentioned by the Companies Law. This regulation protects minority shareholders. However, this could lead to the dissolution of company when many of the shareholders want to resell their shares. The Law also states that "when those two parties couldn't agree on the selling price, they could ask the Court to settle the dispute according to the law", but nobody knows what law will be used for settling the dispute.

As for private business, the liability of its owner is unlimited. However, the Businesses Law, like the Companies Law, only requires the owner to state the amount of money put in the company. Thus he is under no obligation to settle debts with all his assets. This regulation could cause damage to creditors if the company is brought to an end.

In short, there are many new features in regulations on the act of raising fund but many details of this law need to be perfected.