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## Vietnam headway to climate change with wind power

**Wind power policies have been in Vietnam since 2011 and last year Decision No. 39/2018/QĐ-TTg dated 10 September 2018 (“Decision 39”) issued by the Prime Minister of Vietnam (the “PM”) with effect from 1 November 2018 has amended and supplemented Decision No. 37/2011/QĐ-TTg dated 29 June 2011 of the PM on mechanism supporting the development of wind power projects in Vietnam.**

### Onshore and offshore wind power

Decision 39 divides wind power projects into two categories, i.e. onshore and offshore projects. The main factor to determine the project form is the area in which a wind power project is located, specifically, onshore wind power projects are the projects built and operate on land and coastal area having the outer boundary is the average lowest mean-high water for 18.6 years; and on the contrary, offshore wind power projects are classified as the projects built and operated outside the average lowest mean-high water for 18.6 years.

The power producer (Seller) is able to sell power to the Vietnam Electricity (“EVN”) or its subsidiary being the purchaser to off-take the entire electricity output generated to the grid by the relevant wind power project (Buyer) on and from the commercial operation date (COD). The COD shall be counted upon the satisfaction of the following requirements: Initial tests on a part of or the whole plant and its equipment have been done. Decree 39 only mentions that the initial test must be made without identifying that it will be done between the Seller and Buyer. Initial tests are performed internally by the Seller to check with the approved specifications and later the Buyer carries out inspection post which there is another testing of the plant in which Seller, Buyer and other technicians are involved; Electricity generation permit has been issued; and the Seller and the Buyer has agreed on metering number for the payment commencement.

### Feed-in-Tariff (“FiT”)

Decision 39 obligates the Buyer to buy the whole electric output from grid connected wind power projects at new FiT rates. There is no “take or pay” option available from EVN or its subsidiary.

The FiT rate for wind power projects has been raised significantly wind power onshore projects shall be entitled to VND1,928/kWh (excluding VAT, equivalent to UScents8.5/kWh) which is an increase from the previous FiT which was equivalent to UScents7.8/kWh; wind power offshore projects is a new category introduced under Decision 39 and shall be entitled to VND2,223/kWh (excluding VAT, equivalent to UScents9.8/kWh).

The FiT rate shall be applicable for part or whole of wind power projects reaching the COD before 1 November 2021 and for a term of 20 years from COD. For those wind power projects having not reached the COD before 1 November 2021, the regulations keep silent on the future FiT regime. Wind power projects that have been put into operation before the effectiveness of Decision 39 shall also enjoy the FiT rate for their remaining PPA’s terms.

FiT applicable to wind farm projects are comparatively competitive with the major renewable players in Asia:



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Vietnam	India	China
UScents8.5/kWh for onshore projects	UScents5.5/kWh (approx. from state to state)	UScents6/kWh to UScents8/kWh for onshore projects
UScents9.8/kWh for offshore projects		UScents12/kWh for offshore projects

To lure the investors and pump up the wind power industry following Decision 39 as mentioned above, Circular 02/2019/TT-BCT dated 15 January 2019 (“Circular 02”) of the Ministry of Industry and Trade (“MoIT”) regulating the implementation of wind power project development and model power purchase agreement (“Wind MPPA”) for wind power projects is released and has entered into effect from 28 February 2019. Circular 02 has repealed Circular 32/2012/TT-BCT dated 12 November 2012 of the MoIT (“Circular 32”) and Circular 06/2013/TT-BCT dated 8 March 2013 of the MoIT on wind power sector. Circular 02 mainly deals with grid-connected wind power project, land use, electricity permit, and procedure to sign and content of the Wind MPPA of wind power projects.

An investor will only be permitted to prepare the feasibility study for a wind power project if the project has been included in the approved power master plan (either generally for power or specifically for wind power project master plan). If the project has not been included in any master plans, the investor needs to apply for inclusion of the project in the relevant master plan before preparing the feasibility study for the project.

As per Circular 36/2018/TT-BCT (“Circular 36”), wind power project (either onshore or offshore) having the capacity of 1MW or more needs to obtain the electricity permit from the MoIT or ERAV or provincial Department of Industry and Trade (“DoIT”) depending on the capacity and nature of the project.

The land area for the wind power project shall not exceed 0.35ha/MW and the land area of temporary use of the wind power project shall not exceed 0.3ha/MW. This number has been decreased in comparison to repealed Circular 32 in which the land areas for wind project and the land for temporary use were 0.5ha/MW and 0.7ha/MW respectively.

Circular 2 provides for the procedure to sign the Wind MPPA. The new provision is favorable to the investor as the Buyer (as discussed below) must review and sign the Wind MPPA within the period of 15 days. However, it may be difficult to implement this time line requirement in practice.

The Wind MPPA shall be applied compulsorily as provided for by Circular 02. Circular 02 go further and specifically require that the parties may supplement the Wind MPPA to clarify their rights and obligations but may not change the “basic contents” therein. Circular 02 however fails to define the “basic contents” of the Wind MPPA. This makes difficult for the investor to approach EVN proposing any material changes to the Wind MPPA.

The Wind MPPA provides that the Seller will be considered as having committed a breach of the PPA if COD does not occur within 03 months after the scheduled date for COD, unless it is caused by a force majeure event. The Wind MPPA has not addressed the scenarios where the power plant is available for testing and commissioning for COD but the Seller could not proceed due to a breach by the Buyer.

#### **Force Majeure and change in law**

The Model PPA lists out some scenarios that might be considered as the FM events, including: Natural disasters, fires, explosions, floods, tsunamis, epidemics or earthquakes; and violence, riots, war, resistance, sabotage, embargo, siege, blockade, any act of war or community hostilities whether war is declared or not.

The Wind MPPA does not distinguish political force majeure events and natural force majeure events.

The Wind MPPA does not specifically address change-in-law circumstances that lead to uncertainty to an extent. Vietnam has ensured stable investment atmosphere since many years but the laws and regulations keep on changing from time to time based on the development planning and need of the country which poses a risk for the investors who are investing on a long term basis like in wind power project. A recent example is related to the Law on Planning No. 21 that came into force in 2019 and due to which there is a lack of clarity on the overall planning process in Vietnam. However, the guiding regulation for the said law is being worked out.

Under the Wind MPPA, the party that breaches the Contract is obligated to pay compensation for any loss and damage caused by such breach to the affected party. The value of compensation shall comprise the value of actual losses, being direct losses which the party affected must bear and caused by the party in breach and the value of direct benefits which the party affected would have received except for the breach.

Under the Wind MPPA, in the circumstances where the violations have not been solved, the affected party could request the breaching party to remedy such violations or terminate the signed PPA by sending a prior notice to the breaching party. Upon the termination, the affected party is entitled to request for compensation as stated above. The Wind MPPA has not provided for the termination payments in the events of early termination of the signed PPA. The condition for preceding year revenue capped for compensation as provided under the past regulations has been repealed.

The Wind MPPA provides for mandatory choice of Vietnamese law as the governing law. In case of a dispute, the Wind MPPA requires the parties to settle by amicable negotiation first within 60 days as from the date of receipt of notice from the disputing party and 15 days if the dispute relates to payment of tariff. If the negotiation fails then, the parties may elect the Electricity and Renewable Energy Authority (EREA) for conciliation and dispute resolution or go to a dispute resolution body in accordance with the provisions of Circular No. 40/2010/TT-BCT of the MoIT, which is Electricity Regulatory Authority of Vietnam (ERAV) or other jurisdiction pursuant to the laws of Vietnam, which would effectively mean the competent court of Vietnam unless a specific domestic or international/foreign arbitration clause is included.



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