

Legal Update

May 2021

Legal update on Decree 31/2021/ND-CP guiding the Law on Investment 2020

On 26 March 2021, the Government issued Decree 31/2021/ND-CP ("**Decree 31**") providing guidance on the implementation of the Law on Investment 2020 ("**Law on Investment**"). Decree 31 came into effect on the same day, replacing a number of decrees, including Decree 118/2015/ND-CP on investment in Vietnam ("**Decree 118**") and Decree 83/2015/ND-CP on outbound investment.

Below are some notable points and changes by Decree 31:

1. Business lines limited from market access applicable to foreign investors

Decree 31 provides the List of business lines limited from market access applicable to foreign investors¹ in Appendix I ("**Limited Market Access List**").

The Limited Market Access List comprises two sub-Lists:

- (A) *List of business lines not allowed for market access*: this covers 25 business lines such as trading goods and services on the list of goods and services on which monopoly is held by the State in the commercial sector, press activities and information gathering in any form, fishing, overseas contracted employment agency services, temporary import for re-export business; and
- (B) *List of business lines subject to conditions for market access*: this covers 58 specific business lines such as production and distribution of cultural products, including visual recordings, insurance, banking, securities brokerage, telecommunication services, printing services, e-commerce business; and business lines licensed under pilot scheme.

In addition, Decree 31 clarifies the principles of market access applicable to foreign investors as follows:

Business line	Right of market access by foreign investors
List of business lines not allowed for market access	Foreign investors are not allowed to invest
List of business lines subject to conditions for market access	Foreign investors can invest provided that they satisfy the applicable conditions
No commitment by the Vietnamese government on market access to foreign investors	<ul style="list-style-type: none"> ➤ If there is no regulation restricting foreign investors' market access under Vietnam's domestic laws: foreign investors are allowed to access market same as the domestic investors; ➤ If there are regulations restricting the foreign investors' market access under Vietnam's domestic laws: foreign investors must comply with such regulations.

This Limited Market Access List improves market access transparency and efficiency for foreign investors, as well as discarding the inconsistency of Vietnam's market open commitments in different international treaties.

The Ministry of Planning and Investment will coordinate with other relevant authorities to review and collect all market entry conditions applicable to the business lines on the Limited Market Entry Access List and publish these conditions on the National Portal on Investment.

¹Foreign investors include foreign-invested companies under Clause 1 Article 23 of the Law on Investment.

2. List of preferential investment business lines and List of preferential investment locations

Similar to Decree 118, Decree 31 provides (i) the *List of preferential investment business lines*, and (ii) the *List of preferential investment locations*.

While there is no change in the latter, the List of preferential investment business lines now also includes some new business lines towards high-tech and environmentally friendly developments, under the following two categories:

- (A) *special preferential investment business lines*: this covers 4 sectors and 32 business lines, in which new business lines include, amongst others, training high-tech human resources, providing high-tech services, and manufacturing network information security products, etc.), and.
- (B) *preferential investment business lines*: this covers 5 sectors and 67 business lines, in which new business lines include, amongst others, production of non-burned building materials, investment in treatment and use of waste from thermal power plants, and producing environmentally friendly means of transport, etc.).

3. Determining value of the investment capital; independent assessment of value of investment capital, machinery, equipment, technology lines

Another notable change in Decree 31 is that it clarifies the composition of the investment capital for implementing investment projects, which include (i) the investor's contribution capital, (ii) mobilized (loan) capital, and (iii) retained earnings/profit used for re-investment.

The addition of retained earnings for re-investment to investment capital resolves the issue of investors using retained earnings for re-investment with no basis to record it as a capital source of the project. This regulation also creates a legal basis for the investor and investment licensing authority to determine the actual value of implemented investment capital, and then consider necessary amendments to the investment project.

Decree 31 further specifies cases requiring an independent assessment of the value of investment capital, and the quality and value of machinery, equipment and technology lines after the project commences operations. These regulations on valuation create a legal basis for state management, limiting instances of transfer pricing and tax evasion, and defining the responsibilities of investors and the authorities of state agencies in implementing investment projects.

4. Online investment procedures

For projects not subject to in-principle approval, the investor may submit the application dossier to issue or amend the Investment Registration Certificate through the online National Portal on Investment by using a registered account and/or e-signature. This will help facilitate the investment procedures, save time and costs for foreign investors, and improve Vietnam's overall investment environment.



5. Procedures of amendment and termination of investment projects

Decree 31 provides guidance on new procedures for amending investment projects under the following circumstances:

- (A) Transferring investment projects as collaterals
Accordingly, organisations/individuals receiving investment projects as collaterals (so-called “collateral receivers”) such as credit institutions will have the right to either continue implementing the investment projects or transfer them to other investors. In either case, collateral receivers must implement the procedures for amending the investment project in line with Decree 31’s guidance.
- (B) Spinning-off, separating and merging investment projects
An investor has the right to (a) spin-off or separate its investment project into two or more investment projects, and (b) merge investment project(s) into other investment project(s) (the merged and merging investment projects must be implemented by the same investor), if the following conditions are met:
 - Land usage, investment and business conditions are satisfied; and
 - There is no change in the conditions applicable to the investor (if any) provided in the Decision on approving the investment policy or Investment Registration Certificate.
Reducing the procedures for confirming advertisement contents and announcing the satisfaction of conditions for medical devices classification, manufacture, trading and technical consultancy. Instead, the enterprises will publish the relevant dossiers themselves and be able to conduct the advertisement or carry out the business after completing the self-publishing.

Regarding the termination of investment projects, Decree 31 adds a mechanism to terminate investment projects resulting from sham civil transactions for managing and settling cases of crouching investment. Under this new mechanism, the relevant investment licensing authority, related individuals, organizations may request the courts to invalidate sham civil transactions during the project implementation of the Investor to terminate the investment project wholly or partially.

6. Investment under the form of capital contribution, acquisition of shares or capital contribution (“Capital Acquisition”) by foreign investors

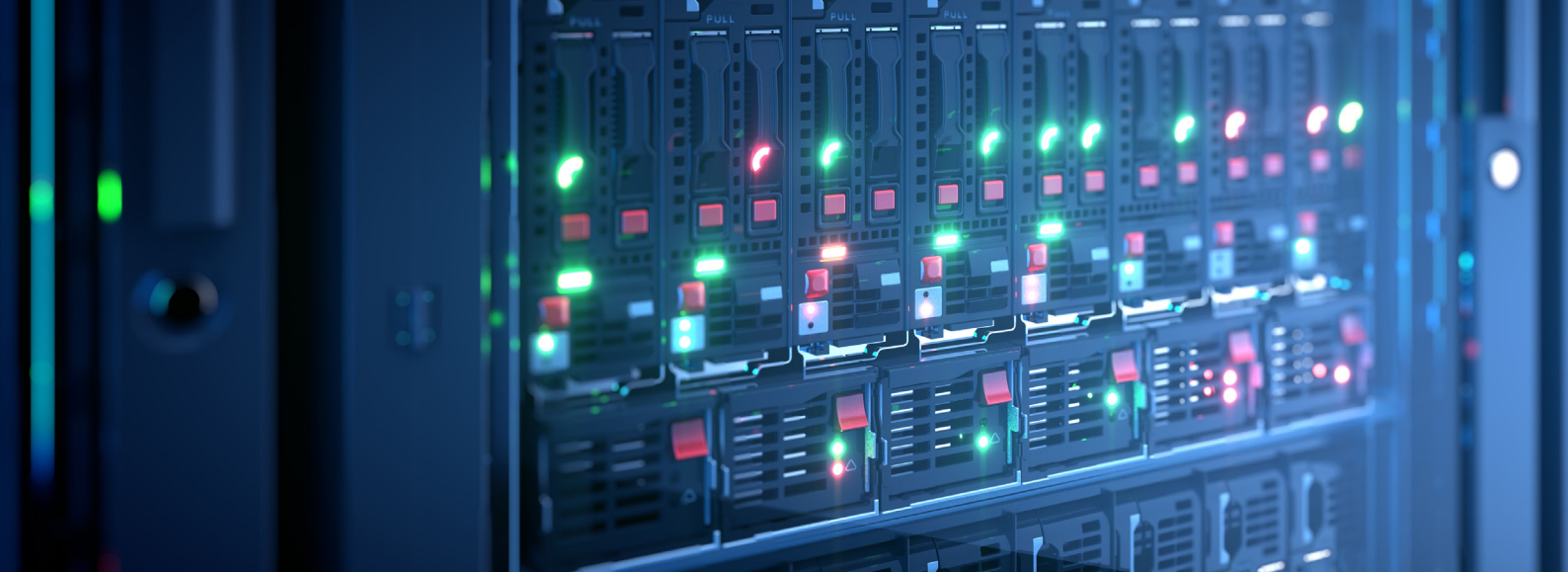
Decree 31 provides detailed guidance on the application documents and procedures for Capital Acquisition activities by foreign investors in cases specified in Clause 2 and Article 26 of the Law on Investment 2020. Key features of this guidance are as follows:

- (A) Depending on the target company’s location, either the local investment licensing authority (i.e. the Department of Planning and Investment (“**DPI**”) or the Management Board of industrial zones, export processing zones, high-tech zones, economic zones) may appraise the Capital Acquisition application. Previously, only the DPI had this appraisal right. This change will make the licensing process for investment projects more consistent, and reduce unnecessary overlap and complexity in the appraisal procedure where the target company is located in industrial zones, export processing zones, high-tech zones, economic zones.
- (B) Once the Capital Acquisition is approved, the target company may amend its members/shareholders with the business registration authority.

Once the procedures for amending member/shareholder records are completed, the rights and obligations of the foreign investors as members or shareholders in the target company will take effect. This is significant because it determines when new members/shareholders are legally recognized for purposes including tax obligations and transfer of management rights of related parties.
- (C) The foreign investor is not required to apply for an Investment Registration Certificate for a Capital Acquisition. The target company which foreign investors acquiring capital therein are not required to carry out the procedures to obtain or amend the Investment Registration Certificate for projects implemented before the foreign investors acquire capital.

Notably, the registration dossier for a Capital Acquisition must include the estimated transaction value and in-principle sales and purchase agreement, in addition to basic contents of the foreign investor and the acquired economic organizations. This additional information requires the investor to be well-prepared for the transaction before conducting the registration procedures with the relevant authorities.

Furthermore, Decree 31 also provides procedures of a Capital Acquisition in the target companies with Land Use Right Certificates on a number of locations including islands; border communes, wards, towns; coastal communes, wards, towns; and areas affecting national defense and security. In these cases, the Ministry of National Defense and Ministry of Public Security must be consulted on the satisfaction of conditions for national defense and security before the investment licensing authority considers on approval of the Capital Acquisition.



7. New regulations on outbound investment

For outbound investments, Decree 31 now allows Vietnamese investors to use shares, capital contribution or investment projects in Vietnam to pay or exchange for their acquisition of shares, capital contribution or investment project of an overseas entity. After the Vietnamese investor obtains an outbound Investment Registration Certificate for their acquisition of shares, capital contribution or investment capital of the overseas entity, the foreign investor/owner of the overseas entity shall proceed their investment procedures in the entity/project of the Vietnamese investors in Vietnam.

For foreign invested enterprises with more than 50% foreign ownership, the investment capital used for outbound investment must be the investors' capital contribution, and not used for implementing the investment projects in Vietnam.

The application for issuance and amendment of outbound Investment Registration Certificate for investment projects with less than VND20 billion in capital and not subject to conditional business lines for outbound investment can be submitted by online form on the National Portal on Investment.

Conclusion

Decree 31 is an important legal document in the legal framework governing investment in Vietnam. Decree 31 guides and clarifies certain provisions of the Law on Investment relating to investment conditions, business lines and conditions for market access applicable to foreign investors, licensing procedures and outbound investment, contributing to resolve overlaps and complications in managing and implementing investment in Vietnam, improving investment environment more transparent and attractive.

If you have any questions or requests related to Decree 31, please contact KPMG for clarification and support.

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