

Implementing decree guiding the Investment Law 2020

Vietnam's new investment landscape

In brief

On 26 March 2021, the government issued Decree No. 31/2021/ND-CP ("**Decree No. 31**") guiding the implementation of the Investment Law 2020. The decree took effect on the same date. With nine chapters and 132 articles, Decree No. 31 provides detailed guidance on the implementation of the Investment Law (which took effect on 1 January 2021), including the following:

- Guidance on procedure of online submissions for investment registration
- The issuance of the list of sectors which foreign investors are restricted from accessing ("**List of Restricted Sectors**")
- Principles for applying the market access conditions
- Documents required for M&A Approval for foreign investors
- Termination of investment projects due to forged transactions
- New business lines eligible for investment incentives
- Regulations applicable to outbound investment projects that are not subject to investment policies

Decree No. 31 helps to regulate different investment procedures, but practice since around end-March shows that the competent authorities still need to interpret and implement the regulations consistently in order to bring to life the positive changes introduced by the Investment Law.

In this issue

[In more detail](#)

[List of Restricted Sectors](#)

In more detail

1. **Guidance on procedure of online submissions for investment registration**

Decree No. 31 continues to drive the digitalization of investment procedures at the competent authorities. Prior to any investment registration, all information of the investment project is required to be entered onto the National Investment Information System (NIIS).¹ The official application dossier must be submitted either online through the NIIS or physically at the authority within 15 days from the date of such declaration.²

¹ Investment Law, Article 38.1. Please refer to <https://fdi.gov.vn/Pages/TrangChu.aspx>

² Investment Law, Articles 38.1 and 39.1.



The online application dossier can be submitted using digital signature or without using digital signature. In case the online application is submitted using digital signature, a hard copy application dossier is not required to be submitted.³ Otherwise, the investor is still required to submit the same to the authority.⁴

An online application will be valid if it meets all of the following conditions:⁵

- The online application comprises of all documents and sufficient contents as prescribed for the hard copy application dossier, presented in the form of electronic documents and named corresponding to the name of the required document.
- Information provided on the NIIS must be complete and accurate as in the hard copies of the application dossier; and must be authenticated by the investor's digital signature or consistent with the hard copies of the application dossier.

2. The issuance of the List of Restricted Sectors

Decree No. 31 provides clarity on what restricted sectors are applicable to foreign investors. The List of Restricted Sectors details: (i) 25 sectors where market access is not allowed; and (ii) 59 sectors where market access is conditional. The specific market access conditions are published on NIIS.

The List of Restricted Sectors is attached in the appendix of this client alert.

3. Principles of applying the market access conditions

Decree No. 31 upholds the negative list approach of the Investment Law and of a number of 21st century international treaties. Specifically, Article 17 of Decree No. 31 provides for principles of applying market access conditions, which include the following:

- Foreign investors will be entitled to market access conditions applicable to domestic investors for any sector not included in the List of Restricted Sectors.
- Foreign investors conducting investment activities in sectors where market access is conditional must satisfy all market access conditions published on the NIIS by the MPI.
- For the business lines that Vietnam has not committed to market access:
 - If Vietnamese laws do not provide market access conditions, foreign investors will be entitled to market access conditions applicable to domestic investors.
 - If Vietnamese laws provide market access conditions, Vietnamese laws will apply.
- If there is a newly issued Vietnamese law that is applicable to business lines for which Vietnam has not committed to market access:
 - Market access conditions applied to a foreign investor prior to the effective date of such new law will continue to apply.
 - Market access conditions under such new law will apply in case of the establishment of a new company or investment project, acquiring an investment project, capital contribution, shares or capital contribution in another company, investment in the form of contract, amending or supplementing business lines that are subject to market access conditions under new law. In this case, the competent authority should not reconsider market access conditions applicable to business lines that were previously approved.
 - Foreign investors conducting businesses after the effective date of such new law must satisfy the market access conditions regulated under the new law.

³ Investment Law, Article 40.1.

⁴ Investment Law, Article 40.2.

⁵ Investment Law, Article 39.3



- Foreign investors who are subject to different market access conditions under different international treaties are able to choose to apply the market access conditions under one of the treaties for all of its registered business lines.
- Foreign ownership limitation under international treaties will apply as follows:
 - If multiple foreign investors contribute capital in, or acquire shares or capital contribution portion of, a company and the investors are subject to one or more international treaties, then the total ownership ratio of all foreign investors will not exceed the **highest ratio** in any of the international treaties regulating foreign ownership in a specific business line.
 - If several foreign investors from one country or territory contribute capital in, or acquire shares or capital contribution portion of, a company, then the total ownership ratio of all foreign investors must not exceed the ownership ratio regulated under the international treaty applied for those foreign investors.
 - Public companies, securities companies, securities investment fund management companies or securities investment funds, or securities investment companies will be governed by securities laws and regulations.
 - If a company conducts several business lines that are subject to different ownership ratio, then the **lowest** foreign ownership ratio will apply.

4. New documents required for M&A Approval

The Investment Law has regulated certain instances where a foreign investor must obtain preliminary approval ("**M&A Approval**") if it intends to contribute capital to, or acquire equity from, an existing company. Decree No. 31 has further stipulated the documents required to obtain the M&A Approval. In comparison with previous regulations, Decree No. 31 requires additional information and documents as below:⁶

- Proposed value of the transaction on capital contribution, or acquisition of share and capital contribution
- In-principle agreement on capital contribution, or acquisition of share and capital contribution
- Copy of the land use right certificate of the target company to which foreign investors contribute capital, acquire shares or capital contributions. This document will be required if the land is located within an island or a coastal and border commune or town and another area that affects national defense and security. If the target company carries out the investment project in industrial zones, export processing zones, high-tech zones, or economic zones established in accordance with the government's regulations, then this document will not be required.

These additionally required documents and information requested at the preliminary stage of the M&A Approval has created some challenges to certain transactions, where there are changes to the transaction value (due to exchange rate fluctuation or otherwise) at a later stage and the authorities have raised such difference as an issue. In other cases, the land-related documents review by the competent authorities has required more time beyond the regulatory time frame.

5. Termination of investment projects due to forged transactions

Article 48 of the Investment Law vests the investment registration authority with the right to terminate the investment projects that are deemed to have been made based on forged transactions pursuant to civil laws.

Article 59 of Decree No. 31 reinforces this regime. Accordingly, the investment registration authority has the ability to terminate, in part or in whole, the operation of an investment project on the basis of a forged transaction pursuant to a court decision or an arbitral award. Furthermore, Article 59 of Decree No. 31 provides that the investment authority and relevant individuals or organization are allowed to initiate a request for the court to rule a forged transaction as an invalid transaction to serve as the basis for the termination of a part or the entirety of the investment project.

6. New business lines eligible for investment incentives

In comparison with the previous implementing decree, Decree No. 31 has supplemented new business lines eligible for investment incentives in its Appendix II, including, among others, as follows:

⁶ Investment Law, Article 66.2 and Article 65.4.b.



- Investment in utilizing excess heat of exhaust gas for power generation by building material manufacturing facilities to save energy and protect the environment
- Investment in the treatment and use of waste from thermal power plants, chemical fertilizer plants and metallurgical plants to make construction materials
- Investment in the treatment and use of domestic waste as fuel in the production of building materials
- Investment in the production of equipment, materials and spare parts for the cement production industry; glass; ceramic tiles; and refractory materials
- Production of eco-friendly means of transport
- Production and processing of mineral to make construction materials
- Production and trading of products based on scientific and technological result of science and technology enterprises
- Production and supply of environmental monitoring equipment, on-site domestic wastewater treatment equipment, eco-friendly products and fluids certified with Vietnam eco label in accordance with the laws on environmental protection
- Activities related to publishing electronic publications
- Investment in SMEs' product distribution chain; investment in SME incubators; investment in technical establishments supporting SMEs; investment in coworking spaces serving SMEs and start-ups as prescribed by the laws and regulations on supporting SMEs
- Investment in start-ups

Generally speaking, it remains to be seen how enterprises can benefit from this incentive scheme.

7. New regulations applicable to outbound investment projects that are not subject to investment policies

Article 61 of the Investment Law authorizes the National Assembly, the Prime Minister, and the Ministry of Planning and Investment (MPI) to approve for outbound investment projects.

For projects that are not subject to investment policies from the National Assembly or the Prime Minister, the MPI will issue an outbound investment registration certificate (OIRC) to such projects. If an outbound project, which is not subject to an investment policy, has a capital of VND 20 billion (approx. USD 869,565) or more, then the MPI must seek a written opinion from the State Bank of Vietnam (SBV) prior to the issuance of the OIRC to allow such offshore contribution.

Article 78.2 of Decree No. 31 further elaborates on the required written opinion from the SBV.

Decree No. 31 further provides that for an outbound project, which is not subject to an investment policy, has a capital of less than VND 20 billion (approx. USD 869,565) to transfer offshore, and does not fall under the list of conditional outbound businesses, the relevant investor can obtain an OIRC by way of submitting a hard copy application dossier to the MPI or submitting a dossier online through NIIS.⁷

List of Restricted Sectors

A. List of sectors where market access is not allowed

1. Trading goods and services on the list of goods and services in which monopoly is held by the state
2. Press activities and information gathering in any form
3. Fishing
4. Security and investigation services

⁷ Investment Law, Article 80



5. Judicial administration services, including judicial assessment services, poste restante services, property auction services, notary services, liquidator services
6. Overseas contracted employment agency services
7. Construction of cemeteries, cemetery services and funeral services for transferring land use right attached to the infrastructure
8. Garbage collection services directly from households
9. Public opinion polling services
10. Blasting services
11. Manufacture and trade in weapons, explosives and supporting tools
12. Import and dismantling of used seagoing vessels
13. Public postal services
14. Merchandise transfer business
15. Trading in temporary import for reexport
16. Exercise of the right to export, import, and distribution of goods in the list of goods that foreign investors and foreign-invested companies are not allowed to exercise export, import or distribution rights
17. Collection, purchase and handling of public property in units of the armed forces
18. Manufacture of military equipment and supplies for the people's armed forces, military weapons, technical equipment, ammunition and specialized vehicles used for the army and police; components, accessories, spare parts, supplies and specialized equipment and technology used for production thereof
19. Providing industrial property representative services and intellectual property assessment services
20. Services of setting up, operating, maintaining navigation aids, water zones, water areas, public navigational channels and maritime routes; service of surveying water zones, water areas, public navigational channels and maritime routes serving the announcement of maritime notices; surveying, constructing and publishing nautical charts for water bodies, seaports, navigational channels and maritime routes; developing and publishing marine safety documents and publications
21. Navigation services to ensure maritime safety in water zones, water areas and public navigational channels; marine electronic information service
22. Inspection (inspection, testing) and certification services of transportation vehicles (including systems, components, equipment and components of vehicles); inspection and issuance of certificates of technical safety and environmental protection for special-use equipment, containers, and dangerous goods packaging equipment used in transportation; inspection and issuance of certificates of technical safety and environmental protection for oil and gas exploration, exploitation and transportation equipment at sea; technical inspection service of occupational safety for machines and equipment with strict requirements on occupational safety installed on transportation vehicles, exploration and exploitation equipment and oil and gas transportation; fishing vessel registry service
23. Services of investigation, assessment and exploitation of natural forests (including logging and hunting, trapping of rare and precious wild animals, management of the fund for plant genes, livestock and microorganisms used in agriculture)
24. Research or use genetic resources of new livestock breeds before being evaluated by the Ministry of Agriculture and Rural Development
25. Tour operator services, except international tour operator services for international tourists to Vietnam

B. Sectors where market access is conditional

1. Production and distribution of cultural products, including visual recordings
2. Producing, distributing and showing of television programs and music, stage performance and motion picture works
3. Supply of radio and television services
4. Insurance, banking, securities brokerage and trading and other related services



5. Post and telecommunications services
6. Advertising services
7. Printing, publication, and release services
8. Measurement and mapping
9. Aerial photography service
10. Educational services
11. Exploration, extraction and processing of natural resources, minerals, oil and gas
12. Hydropower, offshore wind power and nuclear energy
13. Transport of goods and passengers by railway, airway, road, waterway and pipeline
14. Aquaculture
15. Forestry and hunting
16. Betting business, casinos
17. Security services
18. Construction, operation and management of river ports, seaports and airports
19. Real estate business
20. Legal services
21. Veterinary services
22. Trading of goods and related activities of foreign service providers in Vietnam
23. Technical inspection and analysis services
24. Travel services
25. Health and social services
26. Sports and entertainment services
27. Paper production
28. Manufacture of transport vehicles with more than 29 seats
29. Development and operation of traditional markets
30. Commodity exchanges
31. Domestic LCL collection services
32. Auditing, accounting, bookkeeping and tax services
33. Valuation services, consulting services on corporate valuation for equitization
34. Services related to agriculture, forestry and fishery
35. Aircraft manufacturing
36. Manufacturing of railway locomotives and wagons
37. Manufacturing and trading in tobacco products, tobacco raw materials, machinery and equipment specialized in tobacco industry
38. Publishers' activities
39. Ship building and repair
40. Waste collection services, environmental observation services
41. Commercial arbitration services, arbitration mediation services



42. Logistics services
43. Coastal shipping
44. Cultivation, production or processing of rare crops, breeding of rare wild animals, processing and handling of these animals or plants, including live animals and products thereof
45. Production of construction materials
46. Construction and other related technical services
47. Motorcycle assembly
48. Art activities, performing arts, fashion shows, beauty and model contests
49. Air transport supporting services; ground technical services at airports; catering services in an aircraft; navigation information services, aviation meteorological services
50. Ship agency services; ship towing services
51. Services related to cultural heritage, copyrights and related rights, photography, video recording, recording, art exhibitions, festivals, libraries, museums
52. Services related to promotion of tourism
53. Agent, recruitment and scheduling agent, management service for artists, athletes
54. Family-related services
55. E-commerce activities
56. Cemetery business, cemetery service and burial service
57. Airborne seeding and chemical spraying services
58. Maritime pilotage services
59. Investment sectors under pilot programs of the National Assembly, the National Assembly Standing Committee, the Government, and the Prime Minister



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