

New Decree 31/2021 guiding the implementation of the Investment Law 2020 on the Market Entry of Foreign Investors

The Government has issued Decree 31/2021/ND-CP (**Decree 31/2021**) which becomes effective on the signing date, 26 March 2021. Decree 31/2021 provides certain appreciable provisions guiding the negative list approach and the application of market entry conditions of the Investment Law 2020. These implementing provisions are expected to provide more certainty and transparency to foreign investors.

Market Entry Condition List

1. Decree 31/2021 provides one list of business lines which foreign investors, including foreign-invested companies which are deemed as foreign investors under Article 23.1 of the Investment Law 2020, are not allowed to invest in (**Prohibition List**) and one list of business lines which foreign investors must satisfy market entry conditions to invest in (**Market Entry List**). Please see those lists in appendixes below.
2. The Market Entry List provides 58 specific business lines and one of opening item. The opening item allows the National Assembly, the Standing Committee of the National Assembly, the Government, the Prime Minister to issue pilot mechanisms on business lines which should be new business lines rather the business lines existing at the date of Decree 31/2021. As compared to the draft version, the catch-all item in the draft version (i.e., new sectors or businesses which have not been conducted in Vietnam on 1 January 2021) is removed and replaced with this opening item. Legally speaking, if there is no pilot mechanism on a business line which falls within neither the Prohibition List nor the Market Entry List, foreign investors will be treated as domestic investor in terms of market entry conditions when doing such business line.
3. The Market Entry List does not provide investment conditions or market entry conditions (used exchangeable), e.g., foreign ownership limitation, investment form, investor capacity. Instead, the Ministry of Planning and Investment (**MPI**) will coordinate with other authorities to review and collect all market entry conditions and publish such market entry conditions on the National Portal on Investment (see [here](#)).
4. Currently, the Ministry of Planning and Investment has published a consolidated list of investment conditions applicable to foreign investors in Vietnam (see [here](#)). However, it is not easy to read all different international treaties and various domestic regulations to specify applicable investment conditions. Moreover, in practice it could be difficult for investors to determine whether the scope of activities of their planned business fall within the business lines of the Market Entry List. Foreign investors would need to compare their business scope or nature to the description of business lines under Vietnam Standard Industrial Classification and Provisional Central Product Classification (see our post [here](#)).

Expected straightforward and transparent investment conditions and licensing process.

5. Under the repealed Investment Law 2014 and its implementing regulations, licensing authorities must obtain opinions from the MPI and relevant Ministries if foreign investors apply for doing business lines that Vietnam has no commitment and Vietnamese law is also silent on the market entry for foreign investors. Foreign investors have been discouraged in doing such businesses given the licensing process often takes long time while result is uncertain. It is expected that the negative list approach under the Investment Law 2020 and Decree 31/2021 will lift barriers and hopefully make investment conditions and licensing procedures more certain, straightforward, and transparent. In particular:

5.1. Decree 31/2021 repeats the negative list approach of the Investment Law 2020 to which foreign investors are treated as domestic investors in terms of the market entry conditions when investing in business lines which do not fall within the Prohibition List and the Market Entry List. Based on this negative list approach, as long as a business line does not fall within such lists, foreign investors should be treated as domestic investors in terms of the market entry conditions even if Vietnam has no commitment on the market entry for foreign investors in respect of such business lines;

5.2. Article 17.4 of Decree 31/2021 provides the guidance on market entry conditions in respect of business lines that Vietnam has no commitment on the market entry for foreign investors (**Unbound Business**). In particular:

5.2.1. if there is no market entry restriction provided in laws, resolutions of the National Assembly, ordinances, resolutions of the Standing Committee of the National Assembly, decrees of the Government (**Domestic Laws**), foreign investors are treated as domestic investors in terms of the market entry (e.g., no foreign ownership limitation); and

5.2.2. if Domestic Laws provide the market entry restrictions applicable to foreign investors, then Domestic Laws will be applied.

Accordingly, even if an Unbound Business falls within the Market Entry List, if there is no market entry restriction provided in Domestic Laws, foreign investors can invest in such Unbound Business without a foreign ownership limitation (except for acquiring listed shares as discussed below). It is worth noting that regulations issued by a Ministry in its circular shall not be regarded as Domestic Laws for examining the market entry restriction under Decree 31/2021.

6. If Domestic Laws provide new market entry conditions in respect of an Unbound Business:

6.1. foreign investors are entitled to continue the Unbound Business in accordance with the market entry conditions existing before the effective date of the new Domestic Law; and

6.2. new market entry conditions will be applicable to foreign investors conducting investment activities after the effective date of the new Domestic Laws. Foreign investors must satisfy the new market entry conditions when they (i) establish a new company, (ii) implement a new investment project, (iii) take the transfer of investment project, (iv) invest in form of a contract, or (v) change the objective, business lines which are subject to the new market conditions.

Determination of foreign ownership limitation

7. Under Decree 31/2021, the foreign ownership limitation in a target company will be determined in accordance with the following principles:

7.1. if the target company is a public company, securities company, fund management company or securities investment company, the foreign ownership limitation will be determined in accordance with the securities law.

7.2. if the target company has various business lines which are subject to different foreign ownership limitations under international treaties, the total foreign ownership will be capped at the lowest threshold; and

7.3. if foreign investors from different nations or territories are subject to different international treaties, the total foreign ownership of all foreign investors in respect of a specific business line will be capped at the highest threshold amongst the thresholds provided in such international treaties. However, the foreign ownership of foreign investors from the same nations or territory is still subject to the foreign ownership limitation provided in the international treaty applicable to such foreign investors.

Cherry-pick

8. Foreign investors can cherry-pick the market entry conditions under an international treaty applicable to such foreign investors if:

8.1. the international treaty provides the market entry conditions in respect of such foreign investors more favorable than the market entry conditions under Vietnamese law.

8.2. there are different market entry conditions under different international treaties applicable to such foreign investors. In this case, the cherry-picked international treaty will apply to determine the market entry conditions in respect of all business lines and other rights and obligations of the foreign investors.

Market entry for foreign investors from non-WTO members

8.3. Foreign investors from a nation or territory which is not a member of the WTO are entitled to the same market entry conditions applicable to foreign investors from a nation or

territory being a member of the WTO. This is not applicable if Vietnamese law or the international treaty between Vietnam and such non-WTO member nation or territory has different provisions.

This post is written by Ha Thi Dung.

Prohibition List

1. Trading goods and services on the list of goods and services on which monopoly is held by the State in the commercial sector.
2. Press activities and information gathering in any form.
3. Fishing.
4. Security and investigation services.
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. Investment in the construction of infrastructure of cemeteries and graveyards to transfer land use rights associated with such infrastructure.
8. Waste collection services directly from households.
9. Public opinion polling service (public opinion polling).
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. Goods transshipment business.
15. Temporary import for re-export business.
16. Exercise of the right to export, import, and distribution of goods on the list of goods for foreign investors, foreign-invested economic organizations are not allowed to exercise the right to export, import, distribute.
17. Collection, purchase and handling of public goods in armed forces units.
18. Trading in military materials or 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 their production;
19. Intellectual property representation services and industrial property assessment services.

20. Services of the establishment, operation, maintenance and maintenance of aids to navigation, water zones, water areas, public navigational channels and maritime routes; service of surveying water zones, water areas, public navigational channels and maritime routes serving maritime notices; services of surveying, constructing and publishing nautical charts for waters, seaports, navigational channels and maritime routes; building and publishing marine safety documents and publications.
21. Navigation services to ensure maritime safety in water areas, water areas and public navigational channels; marine electronic information service.
22. Inspection (inspection, testing) and certification services for means of transport (including systems, components, equipment, components of vehicles); inspection and issuance of certificates of technical safety and environmental protection for vehicles, specialized equipment, containers, and dangerous goods packaging equipment used in transportation; inspection services and issuance of certificates of technical safety and environmental protection for oil and gas exploration, exploitation and transportation means and equipment at sea; technical inspection service of occupational safety for machines and equipment with strict requirements on occupational safety installed on means of transport and means, exploration and exploitation equipment and oil and gas transportation at sea; fishing vessel registry services.
23. Natural forest investigation, assessment and exploitation services (including gathering wood and hunting, trapping rare wild animals, management of the sources genes for plants, livestock and microorganisms used in agriculture).
24. Researching or using genetic resources of new livestock breeds before being appraised and evaluated by the Ministry of Agriculture and Rural Development.
25. Tourism services, except international tourism services for international tourists to Vietnam.

Market Entry List

1. Production and distribution of cultural products, including visual recordings.
2. Production, distribution and broadcast of television programs and music, stage performance and motion picture works.
3. Supply of radio and television services.
4. Insurance, banking, securities brokerage, and other services related to insurance, banking, and securities.
5. Postal services, telecom services.
6. Advertising services.
7. Printing service, publication issuance services.
8. Measurement and mapping services.
9. FlyCam services.
10. Educational services.
11. Exploration, extraction and process 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 conduit [pipeline].
14. Aquaculture cultivation or breeding.
15. Forestry and hunting.
16. Betting and casino business
17. Security guard services.
18. Construction, operation and management of river ports, seaports and airports.
19. Real estate business.
20. Legal services.
21. Veterinary services.
22. Goods sale and purchase activities and activities directly related to goods trading activities of foreign service providers in Vietnam.

23. Technical inspection and analysis services.
24. Travelling [tourism] 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 wet markets.
30. Commodity Exchange operations.
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. Manufacture of railway locomotives and wagons.
37. Trading tobacco products, tobacco raw materials, and specialized machinery and equipment for the tobacco industry.
38. Publishers' activities.
39. Ship building, and repair services.
40. Waste collection services, environmental observation services.
41. Commercial arbitration services, arbitration mediation services.
42. Logistic 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 related technical services.
47. Motorcycle assembly.
48. Services related to sports, art activities, performing arts, fashion shows,

- beauty and model contests, and other entertainment.
49. Air transport support services; ground technical services at airports and airports; catering services on the aircraft; navigation information services, aviation meteorological services.
 50. Sea transport services; shipping tugboat [ship towing] services.
 51. Services related to cultural heritage, copyright and related rights, photography, video recording, recording, art exhibitions, festivals, libraries, museums.
 52. Services related to tourism promotion.
 53. Agent, recruitment and scheduling, management for artists, athletes' services.
 54. Family related services.
 55. E-commerce activities.
 56. cemetery business, cemetery services and funeral services.
 57. Airborne seeding and chemical spraying services.
 58. Maritime pilotage services;
 59. Investment sector, business lines under the pilot mechanism of the National Assembly, The Standing Committee of the National Assembly, the Government, and the Prime Minister.