

A DETAILED ANALYSIS OF DECREE 31/2021 IMPLEMENTING THE INVESTMENT LAW 2020

Date: 30 March 2022

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I. Background

1. On 26 March 2021, the Government issued Decree 31 to detail and guide the implementation of the Investment Law 2020¹ (**Decree 31/2021**). Decree 31/2021 took effect on the signing date and replaced Decree 118/2015² guiding the Investment Law 2014³ and other related documents.

2. Decree 31/2021 provides some notable points which are new in comparison with Decree 118/2015 and other related documents. This memorandum will discuss such new points in details as below.

II. New points of Decree 31/2021

1. Broader scope of application

1.1. Decree 31/2021 has expanded its scope of application by supplementing the following activities:

1.1.1. Industries, sectors and market access conditions for foreign investors (see further at section 4);

1.1.2. Offshore investment activities (see further at 19); and

1.2. Before Decree 31/2021 took effect, offshore investment activities are separately governed at Decree 83/2015.⁴ The integration of such activities into Decree 31/2021 will make it more convenient for the investors to seek for and apply relevant provisions with respect to the offshore investment activities

2. New form of Government guarantees for the implementation of investment projects within the authority of the National Assembly or Prime Minister and any other important investment projects for development of infrastructure.

2.1. Before Decree 31/2021 took effect, there is only one form of Government guarantee being the Government's assurance to meet the demands for foreign currencies with respect to (i) investment projects within the authority of the National Assembly or Prime Minister to approve investment policy and (ii) any other

¹ The Law on Investment of the National Assembly dated 17 June 2020 (the **Investment Law 2020**)

² Decree 118 of the Government dated 12 November 2015 detailing and guiding the implementation of a number of articles of the Investment Law (**Decree 118/2015**)

³ The Law on Investment of the National Assembly dated 26 November 2014 (the **Investment Law 2014**)

⁴ Decree 83 of the Government dated 25 September 2015 on offshore investment (**Decree 83/2015**)

important investment projects for development of infrastructure (**Important Projects**).⁵

2.2. Article 3.2 of Decree 31/2021 provides that Government guarantee with respect to Important Projects includes (i) guarantee on foreign exchange availability; and (ii) *other forms of guarantee of the Government as decided by the Prime Minister*.

2.3. Thanks to the new provision, the investor will have more chances to obtain Government guarantee when implementing the Important Projects. However, as compared to the draft version, Decree 31/2021 has deleted the provisions on procedure to obtain such forms of Government guarantee. Thus, it is not clear which procedure the investor needs to follow to obtain such forms of Government guarantee in practice.

3. Regime on resolving investors' difficulties and on preventing disputes as between the State and investors

3.1. Article 9 of Decree 31/2021 provides for a regime on resolving investors' difficulties and on preventing disputes between the State and investors with the following contents:

3.1.1. The investor will have the following rights:

(a) to report difficulties, make recommendations related to application and enforcement of laws to the competent authority; and the competent authority must resolve such difficulties and recommendations in accordance with the laws;

(b) to make complaints, denunciation, file a lawsuit in accordance with the laws on complaints, denunciation;

(c) to make an administrative lawsuit in accordance with the law on administrative procedures when there are grounds that an administrative decision or administrative act is contrary to law [and] infringes the lawful rights and interests of the investor;

3.1.2. In case difficulties, recommendations, made by the investors may give rise to an international investment dispute, the competent authority must promptly provide written notice to the Ministry of Planning and Investment (**MPI**), the Ministry of Justice (**MOJ**) and the Ministry of Foreign Affairs (**MOFA**) for coordinated action to prevent such dispute; and

3.1.3. If an international investment dispute arises, then the coordinated resolution of such disputes will be carried out in accordance with the decision of the Prime Minister on the regime for handling international investment disputes.

3.2. This provision has provided a general guideline for the investors to deal with

⁵ Article 10.2 of the Investment Law 2014

difficulties, problems arising from implementing the investment projects. It also supports the competent authority in predicting and preventing potential investment disputes, especially investment disputes between the State and investors in practice.

4. New regulations on market entry of foreign investors

Market entry restriction list

4.1. Decree 31/2021 provides one list of business lines in which the foreign investors are not allowed to invest (Section A of Appendix I of Decree 31/2021) (**Prohibition List**) and one list of business lines in which the foreign investors must satisfy market entry conditions to invest in (Section B of Appendix I of Decree 31/2021) (**Market Entry Condition List**). The Prohibition List and the Market Entry Condition List will apply to the following entities:⁶

4.1.1. Foreign investor as defined under Article 3.19 of the Investment Law 2020;

4.1.2. Foreign-invested enterprises (**FIEs**) which are controlled by foreign investors when they (i) invest in establishing another economic organization; or (ii) invest by making a capital contribution, purchase of shares or capital contribution portion in another economic organization; or (iii) invest on the basis of a BCC contract;

4.1.3. Investors being Vietnamese citizens who concurrently have foreign nationality choosing to apply the conditions on market entry and investment procedures as applicable to foreign investors.

4.2. **The Prohibition List** - The Prohibition List includes 25 business lines in which foreign investors are not allowed to invest. Previously, Decree 118/2015 does not have such a prohibition list specifically applicable to foreign investors. Accordingly, *except for the prohibition list applicable to all investors (both domestic and foreign investors),*⁷ the foreign investors will not know if there is any business line that they are prohibited from investing in case Vietnam has no commitment on such business line under the relevant international treaty. Thanks to this Prohibition List under Decree 31/2021, foreign investors do not have to consult with the MPI to decide whether they are allowed to invest in such business lines or not.

4.3. **The Market Entry Condition List** – The Market Entry Condition List provides 58 business lines with one opening item being industries, business lines under the pilot mechanism of the National Assembly, the Standing Committee of the National Assembly, the Government and the Prime Minister.

4.3.1. Regarding market entry conditions of the Market Entry Condition List, the MPI will coordinate with other agencies to review, update and publish such market entry conditions with respect to each business line on the National Portal on

⁶ Article 16.1 and 16.2 of Decree 31/2021

⁷ Article 8 of Decree 118/2015

Investment (NPOI).⁸ However, it is quite difficult for the foreign investors to specify which investment conditions will be applicable for the relevant business line under various treaties, legal documents as mentioned in the NPOI.

4.4. With respect to other issues of the Prohibition List and the Market Entry Condition List, please see further discussion at [here](#).

Principles to apply market entry restrictions

4.5. The principles to apply market entry restrictions with respect to foreign investors are as follows:

No.	Type of business lines	Principles	Comments
4.5.1.	Business lines under the Prohibition List	Foreign investors are prohibited from investing in such business lines. ⁹	See discussion at 4.2
4.5.2.	Business lines in the Market Entry Condition List	Foreign investors are allowed to invest in such business lines if the relevant market entry conditions are satisfied. ¹⁰	See discussion at 4.3
4.5.3.	Business lines which do not fall into 4.5.1 and 4.5.2	Foreign investors are treated as domestic investors. ¹¹	It is not clear if a business line does not fall into 4.5.1 and 4.5.2 but the international investment treaty has market entry conditions <u>stricter than the Domestic Laws</u> in respect of such business line, whether or not such foreign investors can be treated as domestic investors. In particular, <ul style="list-style-type: none"> (a) Article 17.1 of Decree 31/2021 clearly provides that with respect to business lines which do not fall into the Prohibition List and the Market Entry List, foreign investors will be treated as domestic investors; whereas (b) Article 18.3 of Decree 31/2021 provides that if the Domestic Laws and the international investment treaty has market

⁸ <https://vietnaminvest.gov.vn/SitePages/home.aspx>

⁹ Article 17.2 of Decree 31/2021

¹⁰ Article 17.3 of Decree 31/2021

¹¹ Article 17.1 of Decree 31/2021

No.	Type of business lines	Principles	Comments
			<p>entry conditions which <u>has not been updated in the Prohibition List and the Market Entry Condition List, then such investment conditions will apply.</u></p> <p>Decree 31/2021 only provides a principle that if the international treaty has investment conditions <i>more favorable than</i> Domestic Laws then investment conditions under the international treaty will apply.¹² However, it is silent on the abovementioned case.</p>
4.5.4.	Business lines which Vietnam does not have commitment on market entry conditions under the relevant international treaties.	<p>The following principles will apply in this case:¹³</p> <p>(a) If laws and resolutions of the National Assembly, ordinances and resolutions of the National Assembly Standing Committee, and Government decrees (Domestic Laws) do not contain provisions on market entry restrictions, foreign investors are treated as domestic investors</p> <p>(b) If Domestic Laws have a provision on such restriction, then Vietnamese laws will apply.</p>	<p>Under Decree 118/2015, with respect to business lines which Vietnam does not have commitment under the relevant treaty, the business registration authority will seek for opinions from the MPI and the MPI will at its discretion decide whether or not foreign investors are allowed to invest in or not.¹⁴</p> <p>Thanks to this new principle under Decree 31/2021, the investment procedure will be time-saving and more transparent. This could also attract more foreign investors to invest in Vietnam.</p>

Principles to determine the foreign ownership restriction

4.6. Decree 31/2021 introduces the following new principles for determination of

¹² Article 17.8 of Decree 31/2021

¹³ Article 17.4 of Decree 31/2021

¹⁴ Article 10.2(dd) of Decree 118/2015

foreign ownership restriction under an international treaty on investment, particularly in case of multiple foreign investors subject to different provisions on foreign ownership limitation:¹⁵

4.6.1. If multiple foreign investors are the applicable subject of one or more international treaties and contribute capital/purchase share in an enterprise, their total foreign ownership must not exceed the highest ratio specified in one international treaty with respect to a particular business line;

4.6.2. If multiple foreign investors of the same country or territory contribute capital/purchase share in an enterprise, their total foreign ownership must not exceed the foreign ownership limit under the international treaty applicable to them;

4.6.3. If the target company is a public company or a securities company, the foreign ownership ratio will be determined in accordance with the laws on securities;

4.6.4. If the target company has various business lines which are subject to different foreign ownership limitation under an international treaty, the aggregate foreign ownership restriction must not exceed the lowest threshold.

4.7. The new principles have provided clear instruction for foreign investors to determine their foreign ownership limit when conduct business in Vietnam. This has not been clearly addressed under Decree 118/2015 and the Enterprise Law 2014 previously. However, there might be some issues as follows:

4.7.1. It is not clear whether these principles at 4.6.1 and 4.6.2 could be applied for the case of investment for establishment of economic organization (*đầu tư theo hình thức thành lập tổ chức kinh tế*). This is because Article 17.10(a) and (b) of Decree 31/2021 only mention the case where the foreign investors contribute capital, purchase of capital contribution/shares (*đầu tư theo hình thức góp vốn, mua cổ phần, phần vốn góp*) not including the type of investment in the foregoing sentence.

4.7.2. The principles at 4.6.4 may cause more restrictions to foreign investors who only intend to invest in one business line in a target company but still have to be subject to the foreign ownership restriction of other business lines of such company. The foreign investors should discuss with the target company to remove business lines which are not necessary to the business of the target company.

4.8. With respect to other issues regarding market entry of foreign investors, please see further discussions in [here](#).

5. Changes to subjects eligible for investment incentives

5.1. As compared to Decree 118/2015, Decree 31/2021 has provided notable changes with respect to subject eligible for investment incentives. In particular,

¹⁵ Article 17.10 of Decree 31/2021

5.1.1. Decree 31/2021 has supplemented new business lines eligible for special investment incentives mainly the field of high-tech, information technology, support industry and agriculture;¹⁶

5.1.2. Decree 31/2021 has supplemented a significant number of new business lines which are eligible for investment incentives in all business sectors, especially in the sector of science and technology (*10 new business lines*) and environment protection (*19 new business lines*);¹⁷

5.1.3. With respect to project having investment capital scale of at least VND 6,000 billion (**VND 6,000 billion Project**), Decree 31/2021 requires additional requirements that investors must satisfy to be eligible for investment incentive,¹⁸ which could make it more difficult for investors investing in VND 6,000 billion Project to be entitled to investment incentives;

5.1.4. Decree 31/2021 has also added new investment projects eligible for investment incentives including, *among others*, (i) investment projects using disabled employees¹⁹ and (ii) innovative-related projects;²⁰

5.2. Except for 5.1.3, the investors will have more chances to be entitled to (special) investment incentives in many business sectors thanks to these changes. This could also attract more foreign investors to invest in Vietnam.

6. New principles for application of investment incentives

6.1. Decree 31/2021 also provided new principles to apply investment incentives with respect to certain projects as follows:

6.1.1. With respect to projects entitled to special investment incentives and support, the investor must undertake to satisfy conditions on business lines; total investment capital; the disbursement schedule and other conditions in the IRC, investment policy approval (**IPA**) or agreement with competent authorities.²¹

6.1.2. With respect to projects formed on the basis of project split, separation or merger, such projects will be entitled to the level of investment incentives which investors are entitled to prior to such restructuring for the remaining term entitled to receive investment incentives.²²

7. New forms and procedures related to investment security for the implementation of the investment project

¹⁶ Section A of Appendix II of Decree 31/2021

¹⁷ Section B of Appendix II of Decree 31/2021

¹⁸ Article 19.3 of Decree 31/2021

¹⁹ Article 19.4(c) of Decree 31/2021

²⁰ Article 19.6, 19.7 and 19.8 of Decree 31/2021

²¹ Article 20.6(c) of Decree 31/2021

²² Article 20.7(c), (d) of Decree 31/2021

New form of investment security for the implementation of the investment project

7.1. Except for several projects not required to have investment security under Article 43.1 of the Investment Law 2020, Decree 31/2021 provides that investors could choose one of the following forms of investment security for the implementation of the investment projects using land (**Projects Using Land**):²³

7.1.1. Providing an escrow deposit to the investment registration agency to secure the obligation to implement the investment project (**Investment Deposit**); or

7.1.2. Providing bank guarantee to be issued by a credit institution or branches of foreign banks established in Vietnam to guarantee the investors' obligation to provide the Investment Deposit (**Deposit Guarantee**).

7.2. Previously, Decree 118/2015 does not allow the investor to provide Deposit Guarantee to guarantee the investor's obligation to provide the Investment Deposit but requires the investor to directly make Investment Deposit.

7.3. The supplement of new form of Deposit Guarantee could help the investor to save the investment costs for other works to be done in an investment project.

Removing certain investment projects from the list of subjects entitled to be reduction of investment deposit

7.4. In comparison with Decree 118/2015, Decree 31/2021 has removed the following investment projects to be entitled to the reduction of investment deposit:²⁴

7.4.1. investment projects in industrial parks and export-processing zones, including projects for construction and trading of infrastructure in industrial parks and export-processing zones;

7.4.2. investment projects in hi-tech zones and economic zones, including projects for construction and trading of infrastructure in hi-tech zones and economic zones;

Earlier timing for providing Investment Deposit of Deposit Guarantee

7.5. Article 26.5 of Decree 31/2021 provides that the investor must provide Investment Deposit or Deposit Guarantee prior to the implementation of land clearance plan (*in case the investor does not advance land clearance expenses*) or before the issuance of land lease decision, land allocation decision (*in case the investor has advanced land clearance expenses*).

7.6. The above timing is earlier than Decree 118/2015, which only requires the investor to provide Investment Deposit prior to the time of land allocation; land lease

²³ Article 25.1 of Decree 31/2021

²⁴ Article 26.4 of Decree 31/2021

or land repurposing.²⁵

Procedure for providing Investment Deposit or Deposit Guarantee in tranches

7.7. According to Article 26.6 of Decree 31/2021, when a project consists of multiple investment phases, the procedure to provide Investment Deposit or the Deposit Guarantee could be made in tranches in accordance with each phase of the project as agreed in the Agreement on security of project implementation.

7.8. The investor is allowed to settle obligation to secure project implementation for the next phase as follows:

7.8.1. to transfer the remaining Investment Deposit or Deposit Guarantee from the previous phase to secure the project implementation of next phase without necessarily returning the remaining Investment Deposit or terminating the Deposit Guarantee of the previous phase; and

7.8.2. to pay any additional amount being the difference between the amount deposited or guaranteed for the next phase and the amount of the deposit or guarantee of the previous phase (if any).

7.9. Thanks to this new provision, investors could agree with the investment registration authority to provide the Investment Deposit or Deposit Guarantee in multiple tranches in accordance with each phase of the project. This could also help investor to use all of the resources of investment capital in the most effective way.

8. New provisions on extension of operation term of investment projects

Extension of operation term after the expiry of the original term

8.1. Decree 31/2021 provides clearly that except for certain project,²⁶ after the expiry of operation term, the investor could apply to extend the operation term of project if the following conditions are satisfied:²⁷

8.1.1. be in accordance with national, regional, provincial, urban and special administrative – economic unit planning; objectives, direction of urban development; housing development plan (if applicable);

8.1.2. conditions for land allocation, land lease (if applicable) according to land laws are satisfied.

8.2. However, in all cases, the extended term must not exceed the maximum operation term being 50 or 70 years (as the case maybe) under Article 44 of the Investment Law 2020.²⁸

²⁵ Article 27.2 of Decree 118/2015

²⁶ Article 44.4 of the Investment Law 2020

²⁷ Article 27.4 of Decree 31/2021

²⁸ Article 27.5 of Decree 31/2021

8.3. Previously, the Investment Law 2014 and Decree 118/2015 do not provide for this procedure. Therefore, it seems to suggest that the investor is only allowed to extend the operation term of the project prior to the expiry of the operation term of investment projects.

Projects not entitled to extension of operation term

8.4. Decree 31/2021 has clarified projects using outdated technology and not entitled to extension of operation term under the Investment Law which include, *among others*, projects having capacity or efficiency of technology line less than 85% of the designed capacity; or the consumption of raw materials and energy exceed 15% of the design.²⁹

8.5. The procedure for determination of projects using outdated technology and not entitled to extension of operation term is conducted by the Ministry of Science and Technology and other related authorities in accordance with the Prime Minister's regulations.³⁰

8.6. Previously, Decree 118/2015 and the Investment Law 2014 do not provide for this provision. However, the Government may still refuse to extend the operation term of projects after obtaining opinions from the related authorities.³¹

9. Supplement of "retained profit" as part of investment capital

9.1. There is a notable change in the composition of investment capital under Decree 31/2021 (in comparison with Decree 118/2015) as follows:

9.1.1. Under Article 2.15 of Decree 118/2015, investment capital of the project includes (i) capital contributed by the investor; (ii) capital raised by the investor; whereas

9.1.2. Under Article 28.2 of Decree 31/2021, investment capital to implement the project includes (i) capital contributed by the investor; (ii) capital raised by the investor and (iii) profit retained by the investor for reinvestment.

9.2. Before Decree 31/2021 took effect, many investors use retained profit to reinvest in their project (**Retained Profit**) but there is no clear legal ground to recognize Retained Profit as a part of investment capital. This also creates many difficulties for investment registration authorities to determine the actual value of project investment capital as compared to the investment capital recorded in the IRC. The supplement of Retained Profit as part of investment capital has provided clear legal ground for both investors and investment authorities to determine the actual value of the investment capital.

²⁹ Article 27.10(a) of Decree 31/2021

³⁰ Article 27.11 of Decree 31/2021.

³¹ Article 25.1(b); 36.3 of Decree 118/2015

10. Independent inspection of the value of investment capital

10.1. Article 28.3 of Decree 31/2021 provides that an independent inspection (*giám định độc lập*) of investment capital is conducted in the following cases:

10.1.1. the investment authority or the tax authority has grounds to determine that the investor has not declared tax truthfully, accurately or completely regarding the value of investment capital pursuant to the law on tax and tax management;

10.1.2. the investment authority or the science and technology authority have grounds to determine that the investor has breached the provisions on application of transfer of technology during the process of project implementation pursuant to the law on technology transfer.

10.2. This provision has provided clear legal grounds for the governmental authorities to better control the investment activities and also prevents the tax evasion by the investors in practice.

11. Procedure for selecting of investors

11.1. Before Decree 31/2021 took effect, Decree 118/2015 only has general provisions regarding selection of investors. For example, Article 22.2 of Decree 118/2015 provides that an investor, who wins the auction of LUR or the bid for an investment project using the land, will implement the investment project in accordance with the decision on approval of auction/bid result and not required to conduct the procedures to obtain an in-principle approval on investment.

11.2. The Investment Law 2020 and Decree 31/2021 has clarified procedure to select investors in case of (i) auction of land use rights in accordance with the land law; (ii) bidding to select investors in accordance bidding regulations; and (iii) issuing in-principle approvals without being subject to the former cases at (i) and (ii).³²

11.3. It seems that the procedure to select investors under Decree 31/2021 is more complicated than Decree 118/2015, which may create difficulties for the investor to be selected as an investor of an investment project.

12. Online procedure for issuance and adjustment of IRC

12.1. With respect to a project not requiring investment policy approval, Article 39.1 of Decree 31/2021 provides that the investor could choose to submit application for issuance of adjustment of IRC (i) in written form or (ii) via online on the National Investment Information System with or without a digital signature.

12.2. An online application for IRC must include documents and contents as required in case of paper application but presented in the form of e-documents,

³² Article 29 of the Investment Law 2020; Article 29 of Decree 31/2021

which have the same legal effect as written document.³³

12.3. Previously, Decree 118/2015 does not provide this procedure. Under Decree 118/2015, in all cases of issuance of adjustment of IRC, the investor must submit paper application directly to the investment registration authority without any exception. Thanks to this new provision under Decree 31/2021, the investor' implementation of investment projects will be more cost - saving and time – saving. This could also improve the investment environment in Vietnam in general.

13. New procedure for receiving investment projects as secured asset

13.1. Decree 31/2021 allows the credit institutions or organizations, individuals receiving secured assets being investment project to either transfer such investment project³⁴ or directly implement such investment project.³⁵ In each case, the investor must perform the procedure for adjustment of investment projects in accordance with Article 49 of Decree 31/2021.

13.2. This is the new procedure under Decree 31/2021 as compared to Decree 118/2015, which could create legal basis for investors to mortgage, pledge the investment projects and transfer such mortgaged, pledged projects in practice.

14. New procedure for split, separation, merger of investment projects

14.1. For the first time, Decree 31/2021 provide the concepts of split, separation, merger of investment projects which are similar to the split, separation, merger of enterprises.³⁶ According to Decree 31/2021, the split, separation, merger of investment projects (**Project M&A**) must satisfy the following conditions:³⁷

14.1.1. Conditions for using land according to land laws, business conditions and other conditions by laws;

14.1.2. The investor must not change the investor's conditions (if any) specified in the IPA or IRC prior to the Project M&A.

14.2. Before Decree 31/2021 took effect, the investor does not have clear legal basic to implement the Project M&A. The new procedure is expected to significantly contribute to the M&A market with respect to investment projects in Vietnam.

15. New procedure for amendment of investment project in case of using land use right, land-attached assets to contribute capital or conduct business cooperation

15.1. Decree 31/2021 provides clear procedure for amendment of an investment

³³ Article 39.2 of Decree 31/2021

³⁴ Article 49.1 of Decree 31/2021

³⁵ Article 49.6 of Decree 31/2021

³⁶ Article 50.1 of Decree 31/2021

³⁷ Article 50.2 of Decree 31/2021

project in case of using land use right, land-attached assets of such investment project to contribute capital to an enterprise³⁸ or to conduct business cooperation.³⁹ In each case, Decree 31/2021 stipulates conditions for capital contribution or business cooperation using land use right, land-attached assets and specific documents necessary in an application for amendment of investment project.

15.2. Previously, Decree 118/2015 and the Investment Law 2014 do not have specific provisions on amendment of investment project on these circumstances. This has caused difficulties for investors in using land use right and land-attached assets to contribute capital or conduct business cooperation. Decree 31/2021 has taken into account this issue and supplemented provisions regarding these circumstances. Thanks to new provisions under Decree 31/2021, investors will have clear legal basic to invest in projects using land use right or land-attached assets in Vietnam.

16. New procedure for suspension of operation of investment project

16.1. Previously, Article 47 of the Investment Law 2014 has provided circumstances in which the operation of investment project will be suspended. However, Decree 118/2015 does not provide the conditions and procedure with respect to suspension of the operation of the investment project in each circumstance.

16.2. Decree 31/2021 has provided clear conditions and procedure for suspending investment project in cases that (i) investor voluntarily suspends the operation of investment project; (ii) the investment state management authority decides to suspend the operation of the investment project; and (iii) Investment projects cause harm or are likely to cause harm to national defense and security.⁴⁰

17. New provisions on capital contribution, share purchase by foreign investor

Change of the competent authority responsible for issuing M&A Approval

17.1. Decree 31/2021 requires the economic organization to which a foreign investor acquires control (**Target Company**) to submit the registration dossier for obtaining approval on capital contribution, share purchase by foreign investors (**M&A Approval**) to the Management Board of industrial zones or Department of Planning and Investment (**DPI**) (as the case maybe).⁴¹

17.2. Previously, under Decree 118/2015, the authority responsible for reviewing dossier to issue M&A Approval is the DPI only, even if the Target Company is located in industrial zone.⁴²

17.3. This change under Decree 31/2021 may have some issues as follows:

³⁸ Article 52 of Decree 31/2021

³⁹ Article 53 of Decree 31/2021

⁴⁰ Article 56 of Decree 31/2021

⁴¹ Article 3.2 of the Investment Law 2020; Article 66.2 and 34 of Decree 31/2021

⁴² Article 26.3(a) of the Investment Law 2014; Article 46.3(a) of Decree 118/2015

17.3.1. Since this is the first time the Management Board of industrial zones was granted the right to review application of and issue M&A Approval, it may lack of experience in doing such work. This may prolong the procedure to issue an M&A Approval, which could delay the investment schedule of the investors;

17.3.2. Because the M&A Approval can be issued by two different authorities, this may potentially result in inconsistency between such authorities when implementing procedure to issue an M&A Approval in practice.

Supplement of composition of application dossier to obtain M&A Approval

17.4. As compared to the Investment Law 2014,⁴³ Decree 31/2021 supplements the following required information/documents under the application dossier for registration of capital contribution/share purchase by foreign investors:⁴⁴

17.4.1. the information on the expected value of share purchase agreement, capital contribution agreement; the investment project of the Target Company (if any);

17.4.2. the in-principle agreement on capital contribution, share purchase between the foreign investor and the Target Company;

17.4.3. A copy of land use right certificate (LURC) of the Target Company (if applicable).

17.5. It seems that Decree 31/2021 requires the investor to provide more details about the expected transaction between foreign investors and the Target Company as well as the investment projects currently implemented by the Target Company. Thus, the investor and the Target Company must prepare more carefully before submitting application dossier to the competent authority when acquiring control in the Target Company.

Receiving capital contribution/shares via contract of exchange, donation, inheritance or other types of ownership transfer contract

17.6. Decree 31/2021 introduces new provision requiring foreign investors receiving capital contribution/shares via contract of exchange, donation, inheritance or other types of ownership transfer contract to satisfy conditions and procedure similar to investors conducting capital contribution/share purchase.⁴⁵

17.7. This new provision has some issues as follows:

17.7.1. This may create more burdens for foreign investors in case of receiving capital contribution/share via a contract of exchange, donation, and inheritance;

17.7.2. It is not clear what “*other types of ownership transfer contract in accordance with*

⁴³ Article 26.2 of the Investment Law 2014

⁴⁴ Article 66.2 of Decree 31/2021

⁴⁵ Article 65.5 of Decree 31/2021

the law” mean. Without the clarification, any type of contract under which the ownership of share/capital contribution was transferred must be subject to such requirement. This could create unreasonable restrictions for foreign investors to invest in Vietnam.

New procedure on acquisition by foreign investors in the Target Company having LURC for land on an island or on a coastal or border commune, ward or town or in another area which affects national defence and security (Special Areas).

17.8. Decree 31/2021 provides a separate procedure on acquisition by foreign investors in the Target Company having LURC for Special Areas, in which the investment registration authority must obtain opinions from Ministry of Defence (MOD) and the Ministry of Public Security (MPS) regarding the fulfillment of conditions on defence, security assurance and relevant conditions on using land before reviewing the application submitted by the Target Company.⁴⁶

17.9. It seems that the procedure for acquisition by foreign investors in the Target Company having LURC for Special Areas is more complicated and time-consuming than other cases. Previously, Decree 118/2015 does not provide for such a separate procedure on this case.

Removal of provision on exemption from obtaining or amending IRC or IPA

17.10. Under Decree 118/2015, the Target Company is clearly exempted from obtaining or amending the IRC or IPA for existing projects when the foreign investor acquires control in such Target Company.⁴⁷

17.11. However, this clear exemption is no longer provided under Decree 31/2021. Thus, this may give rise to confusion as whether or not the Target Company must obtain or amend the IRC or IPA after the acquisition of foreign investors (see further discussions at [here](#)).

18. Termination of investment projects based on a sham transaction

18.1. The Investment Law 2020 supplements a case in which Vietnamese authorities could terminate an investment project if the investors conduct investment activities based on sham transactions (*giao dịch giả tạo*) under the Civil Code 2015.⁴⁸ This provision may be applied in case of a nominee arrangement, where the nominee conducts the investment activities for the benefits of another person (e.g., foreign investor) could be regarded as a sham transaction.

18.2. Decree 31/2021 has clarified several points regarding the procedure in which

⁴⁶ Article 66.4 of Decree 31/2021

⁴⁷ Article 26.4 of Decree 118/2015

⁴⁸ Article 48.2(e) of the Investment Law 2020

an investment project could be terminated based on this ground:⁴⁹

18.2.1. a sham transaction must be determined in accordance with the Civil Code 2015 based on an effective court judgement, decision or arbitral award.

18.2.2. the investment registration authority, and relevant entities have the right to request the competent Court to declare a sham transaction to be invalid to serve as basis for termination of investment project

18.3. This could be understood that the investment registration authority is only allowed to terminate an investment project based on a sham transaction after a court judgment/decision or arbitral award took effect. This procedure may take a long time and it is not clear whether the investor could continue to implement the investment project pending the court's decision.

19. Offshore investment activities

Conditions applicable to offshore investment in real estate sectors

19.1. In comparison with the Investment Law 2014 and Decree 83/2015, the Investment Law 2020 has supplemented several business lines which the investors must satisfy specific conditions when investing overseas including: (i) banking; (ii) insurance; (iii) securities; (iv) press, radio and television; and (v) real estate business.

19.2. Decree 31/2021 has clarified conditions applicable to the above-mentioned business lines,⁵⁰ including conditions applicable to offshore investment in real estate sectors. In particular, Article 72.3 of Decree 31/2021 provides that with respect to real estate business, only enterprises established in accordance with the Enterprise Law can invest overseas.

19.3. This condition may restrict the right of individual to invest in real estate sectors oversea.

New capital resource when making offshore investment

19.4. In comparison with provision on capital resources when making offshore investment under Decree 83/2015,⁵¹ Decree 31/2021 has supplemented a new capital resource for making offshore investment which is “share, capital contribution and investment projects” of the investors.⁵²

19.5. In particular, Article 69.4 of Decree 31/2021 provides that the investor is allowed to use his/her shares, capital contribution or investment project in Vietnam to make payment or swap for the purchase of shares, capital contribution or investment project of a business organization overseas. In that case, the Vietnamese

⁴⁹ Article 59 of Decree 31/2021

⁵⁰ Article 72 of Decree 31/2021

⁵¹ Article 4 of Decree 83/2015

⁵² Article 69.2(dd) of Decree 31/2021

investor must carry out the procedures for the issuance of an offshore investment registration certificate before implementing the investment procedures in Vietnam.

19.6. This new provision may create solid legal basis for the investors to use their shares, capital contribution and investment projects as capital resources when making offshore investment.

Offshore investment in case of foreign-invested enterprises in Vietnam

19.7. In comparison with Decree 83/2015, Decree 31/2021 has supplemented conditions applicable to offshore investment in case of foreign-invested enterprises in Vietnam. In particular, Article 70 of Decree 31/2021 provides that with respect to economic organizations which have foreign investors holding more than 50% of charter capital, the source of offshore investment capital must be equity not including contributed capital to carry out investment activities in Vietnam.

19.8. It seems that this provision is supplemented to limit the foreign-invested enterprise's use of loan capital to invest overseas and ensure that the offshore investment activities of foreign-invested organizations will not adversely affect investment activities in Vietnam.

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