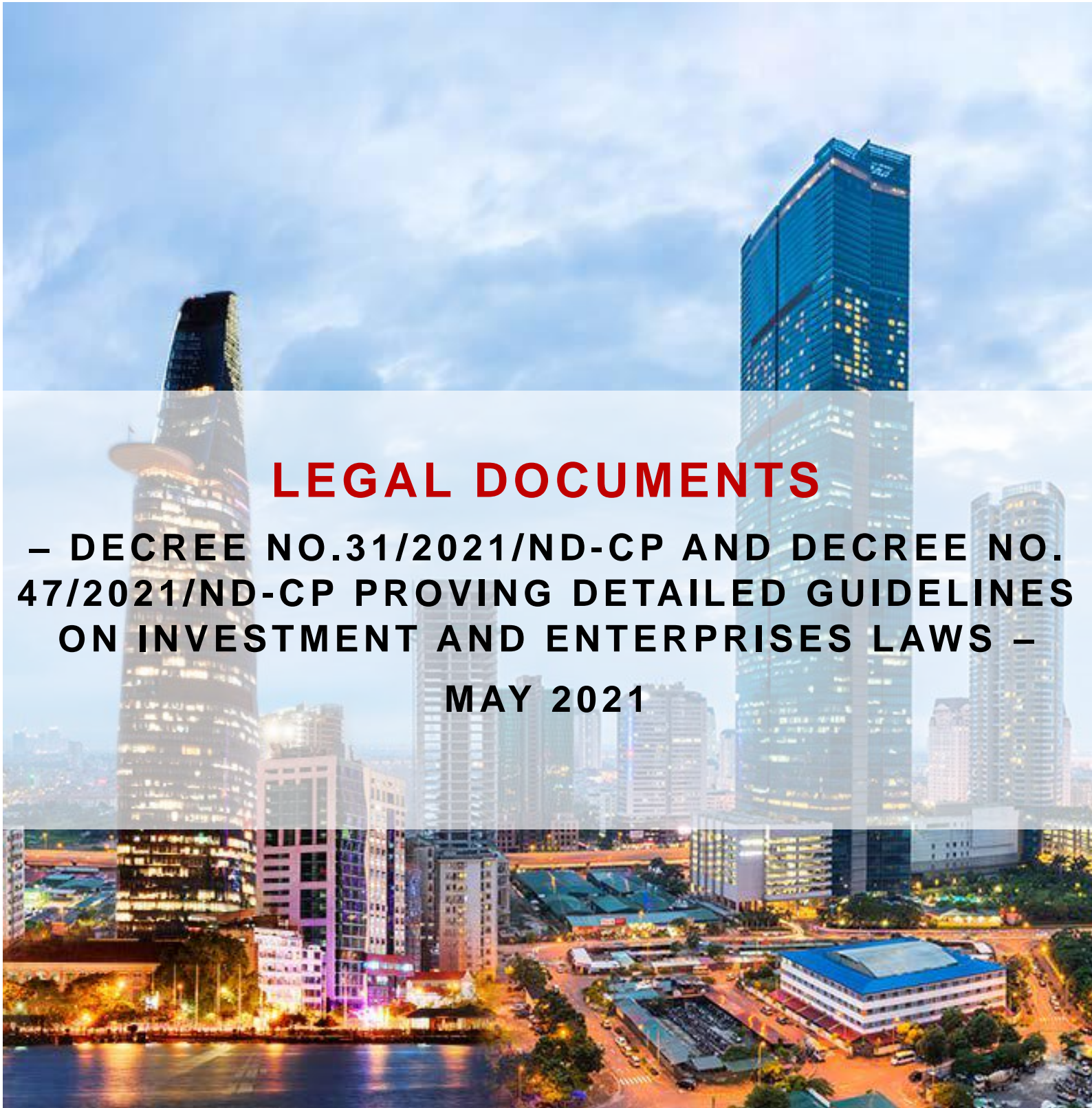




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LEGAL DOCUMENTS

**– DECREE NO.31/2021/ND-CP AND DECREE NO.
47/2021/ND-CP PROVING DETAILED GUIDELINES
ON INVESTMENT AND ENTERPRISES LAWS –
MAY 2021**



Notable Guidance on 2020 Law on Investment under Decree No. 31/2021/ND-CP

The Government has recently issued Decree No. 31/2021/ND-CP dated 26 March 2021 providing detailed regulations and guidance on implementation of the 2020 Law on Investment (“**Decree 31**”) as a replacement for previous guiding decrees on investment (i.e. Decrees No. 118/2015/ND-CP dated 12 November 2015, No. 37/2020/ND-CP dated 30 March 2020, No. 83/2015/ND-CP dated 25 September 2015, No. 104/2007/ND-CP dated 14 June 2007, No. 69/2016/ND-CP dated 01 July 2016, No. 79/2016/ND-CP dated 01 July 2016).

This Newsletter sets out notable changes under Decree 31 which already took effect from 26 March 2021.

1. New Definitions

❖ Other Areas Which Affect National Defence and Security

The 2020 Law on Investment provides for a number of cases where a foreign investor acquiring capital/share of members/shareholders of a target company must obtain a notice of satisfaction of conditions for share/capital acquisition from the competent authority (the “**M&A Approval**”). In particular, an M&A Approval is required if the target company is located in an area which affects national defence and security.

“*Areas affecting national defence and security*” as detailed under Decree 31 consist of the following:

- (i) areas with defence and security works, military zones, restricted zones, protection zones, safety belts of defence work and military zones in accordance with the law on protection of defence works and military zone;
- (ii) areas which border political, economic, diplomatic, scientific-technical, cultural and social objectives guarded by the People's Police Force;
- (iii) important construction works of national security and corridor which protect important construction works of national security;

- (iv) economic - defence zones;
- (v) areas that are valuable to military defence; and
- (vi) areas in which, to ensure national defence and security, foreign organizations and individuals are banned from owning houses.

❖ Business Lines Having Not Been Committed by Vietnam for Market Access

Decree 31 for the first time provides for a new definition of “*business lines which have not been committed by Vietnam for market access*”.

In particular, the *business lines having not been committed by Vietnam for market access* are defined as (a) those that have not/yet been committed by Vietnam for market access in accordance with international treaties on investment; or (b) those following which Vietnam reserves the right to promulgate measures, which are inconsistent with obligations on market access, national treatment or other obligations on non-discrimination between domestic and foreign investors as stipulated under those treaties, to be applied to foreign investors investing in those business lines.

2. Market Access Conditions for Foreign Investors

❖ Cherry-Picking of Market Access Conditions

Under Decree 31, foreign investors are allowed to cherry-pick the market access conditions under an international treaty applicable to them if:

- (i) that international treaty provides for the market access conditions [applicable to foreign investors] which are more favourable than the market access conditions under the Vietnamese law; or
- (ii) there are different market access conditions [applicable to foreign investors] under different international treaties, the foreign investors are entitled to cherry-pick the international treaty having market-entry conditions to be applicable to all business lines and

other rights and obligations of the foreign investors.

❖ Market Access for Foreign Investors from Non-WTO Members



Under Decree 31, unless the Vietnamese law or the international treaty between Vietnam and the relevant non-WTO nation member provides for otherwise, foreign investors from a nation or territory which is NOT a member of the WTO are entitled to the same market access conditions applicable to foreign investors from a nation or territory being a member of the WTO.

❖ Determination of Foreign Ownership Limitation

Decree 31 also provides for more details on the determination of foreign ownership limitation. Specifically, if foreign investors from different nations or territories are subject to different international treaties on investment, the total foreign ownership ratio of all foreign investors in a company carrying out a specific business line will be capped at the highest threshold amongst the thresholds provided in such international treaties.

On the other hand, if the company carries out various business lines which are subject to different foreign ownership limitations under the international treaty on investment, the foreign ownership ratio will be capped at the lowest threshold.

It should be noted that if the 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 (e.g. a foreign investor being an individual is only entitled to own up to 49% of the charter capital of a securities company or fund management company).

3. Investment Incentives

Numerous objects entitled to investment incentives are newly introduced in Decree 31, consisting of the following:

- (i) projects on construction of social houses;
- (ii) projects having at least 30% of employees being disabled persons;
- (iii) projects involving technology transfer in the List of Technologies Encouraged to be Transferred as provided by the competent authorities; incubators and science and technology business incubators; enterprises producing and supplying technologies, equipment, products and services to satisfy environmental protection requirements;
- (iv) innovative start-up;
- (v) research and development centre;
- (vi) projects investing in product distribution chain of small and medium enterprises; and
- (vii) Centre for Innovation.



4. Prohibited and Restricted Business Lines Applicable to Foreign Investors

Decree 31 for the first time introduced two lists of prohibited/restricted business lines applicable to foreign investors.

In particular, one of the two lists set out 25 business lines prohibited to be carried out by foreign owned companies (e.g. *press activities and information gathering in any form; goods transshipment business; temporary import for re-export business*). The other second list specifies 59 conditional business lines which the investment to which by foreign investors are required to satisfy certain conditions (e.g. *insurance, banking, securities brokerage, and other services related to insurance, banking, and securities; advertising services; printing service, publication issuance services*).

That means that, in case of investing in other business lines falling out of the above two lists, foreign investors shall be subject to the same treatment applicable to domestic investors.

5. Supplement to Certain Cases where Amendment to Investment Project is Required

Decree 31 further details the application file and procedures for amendment to the investment project in case where:

- (i) the investor receives the transfer of an investment project being collateral;
- (ii) the investment project is divided, separated or merged; and
- (iii) the land use rights, assets attached to land used for investment projects are contributed as capital into an enterprise or business cooperation.

6. Licensing Procedures

❖ Handling Fraudulent Application File

Under Decree 31, the investment registration authorities shall carry out the following steps to handle fraudulent application file for investment procedure.

Firstly, the investment registration authorities shall notify investors in writing of their violation. After which, they shall, as the case may be:

- (i) cancel or report to competent authorities for considering the cancelation of decision on approval for investment policies, decision on approval for investors, investment registration certificate, outward investment registration certificate and other relevant documents (collectively called the “**Licenses**”) which are initially issued; or
- (ii) remove the contents of the Licenses as recorded based on the false information.

Subsequently, the investment registration authorities shall recover the status of the Licenses which were issued on the basis of the most recent valid application file and concurrently, handle by themselves or report to competent authorities to handle this case in accordance with the laws.

In the above cases, the investors shall be responsible for all damages and losses incurred by their submission of fraudulent application file.

❖ On-line Submission

Decree 31 supplements one more manner of filing regarding the procedures for issuance and amendment to the investment registration certificate. Specifically, if the investment project does not fall into cases where the investment policy approval is required, the investor has the option to submit the application file for issuance and amendment to the investment registration certificate either in paper documents or via the national information system on investment.

Notable Guidance on 2020 Law on Enterprises under Decree No. 47/2021/ND-CP

On 01 April 2021, the Government promulgated new Decree No. 47/2021/ND-CP (“**Decree 47**”) to replace a number of regulations guiding enterprises (i.e. Decrees No. 81/2015/ND-CP dated 18 September 2015, No. 93/2015/ND-CP dated 15 October 2015, No. 96/2015/ND-CP dated 19 October 2015 and Decision No. 35/2013/QD-TTg dated 7 June 2013).

Basically, Decree 47 still retains most of provisions of the above Decrees No. 81/2015/ND-CP, No. 93/2015/ND-CP, No. 96/2015/ND-CP and Decision No. 35/2013/QD-TTg by incorporating the contents of all those Decrees and Decision into a single legal document. Below are remarkable changes of Decree 47.

1. Social Enterprises

While retaining most of provisions applicable to social enterprises in Decree No. 96/2015/ND-CP, Decree 47 supplements and clarifies further the social obligations/purposes which must be complied with or achieved by the social enterprises during their operation to be entitled to enjoy privileges provided by the State. Generally, under Decree 47, such privileges shall be revoked in case that the social enterprises fail to perform or fully perform its registered social obligations or fail to fully achieve its registered social purposes. The revocation of the privileges is not applied in case of early termination of performing social obligations/purposes prior to committed duration during which the social enterprises perform such social obligations/purposes.

In addition, also under Decree 47, director or general director of the social enterprises shall also be jointly responsible for damages arising from failure of the social enterprises as mentioned above while Decree 96 /2015/ND-CP was silent on the matter.

2. Voting Preference Shares and Mutual Cross Ownership

Under the new Decree 47, the charter of a joint stock company must specify details on the time and total voting slips or voting rates for each voting preference share. Additionally, the 3-year limitation on voting preference share now shall not apply to an organization being authorised by the Government to hold such preference shares in the joint stock company.

That also should be noted that in respect of matter of mutual cross ownership, Decree 47, while still retains other acts previously provided in Decree No. 96/2015/ND-CP including:

- (i) joint capital contribution to establish a new enterprise; and
- (ii) joint purchase of a capital contribution portion or shares of an established enterprise,

also supplements a few acts which shall qualify as the mutual cross ownership. Those acts include joint receipt of share transfer, capital contribution from the members, shareholders of existing enterprises.

3. Reporting Regimes and Information Publication

The reporting regimes which are applicable to state-owned enterprises are restructured to be clearer, straight forward and all consolidated in Decree 47, instead of being separately regulated in different Decrees as before.

A new requirement firstly introduced in Decree 47 is the establishment by State-owned enterprises of a website for publishing the basic information of the enterprises, periodical and extraordinary reports according to the laws within 3 months from the effective date of Decree 47.

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