

Legal *News*



NEW REGULATIONS ON SALE AND PURCHASE ACTIVITIES AND RELATED ACTIVITIES OF FDI COMPANIES



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The Government has issued the Decree No. 09/2018/ND-CP detailing Law on Commerce and Law on Foreign Trade Management governing the sale of goods and other activities directly related to the sale of goods of foreign investors and foreign-invested business entities in Vietnam (“**Decree 09**”) on January 15, 2018; replacing the Decree No. 23/2007/ND-CP dated February 12, 2007 on the sale of goods and other activities directly related to the sale of goods of foreign investors in Vietnam (“**Decree 23**”). The Decree 09 especially took effect from the date of its promulgation, prompting relevant enterprises and agencies to urgently study the implementation.

In principle, in comparison with the Decree 23, the Decree 09 introduces some progressive regulations and makes favorable conditions for foreign investors and foreign-invested economic organizations to express policies of the Government of Vietnam regarding implementation of its WTO Commitments on the opening of the distribution market in Vietnam. There are a number of salient points as follows:

Narrowing the scope of activities being subject to Business License

One of the most significant advances of Decree 09 is to narrow the scope of activities being subject to Business License of a foreign-invested economic organization. While previously FDI enterprises were required to apply for Business License for exercising their rights to export, import, and conduct wholesale and retail activities, ***FDI enterprises now do not need to apply for a Business License for export and almost do not have to apply for this license for import and wholesale distribution*** (only required for importing and distributing wholesale goods for oil and lubricants).

Regarding the sale of goods activities, Decree No. 23 governed all activities in connection to the sale of good setting forth in Chapter IV, V, VI of the Law on Commerce. However, local authorities failed to implement this procedure due to ambiguity of applicable laws and regulations. ***Decree 09 now details the activities related to sale and purchase of goods being subject to a Business License***, and scope of activities subject to this license is narrower comparing to Decree 23. Activities related to the sale and purchase of goods which are subject to a Business License in accordance with Decree 09 include:

1. Provide logistics services; except those committed on opening the market by Vietnam in international treaties to which Vietnam is a signatory;
2. Goods leasing (financial leasing excluded), except leasing of construction equipment with operators;
3. Trade promotion services, except advertising services;
4. Trade intermediation services;
5. E-commerce services;
6. Bidding organizing services for goods/services.

Reducing the administrative procedures and time for implementation

Instead of Provincial People's Committee (the "PC"), now ***the provincial Department of Industry and Trade of the province*** where the FDI enterprise or its retail outlets locate is in charge of Business License. This change shall reduce the administrative procedures since previously although provincial PC used to be the licensing authority, it normally assigned the Department of Industry and Trade or the Department of Planning and Investment to proceed and report to it. It also helps to shorten processing time. Under Decree 09, time for license shall be saved 17 days comparing to the total time under Decree 23 in which the time shall be reduced to ***10 working days*** in case of no consultation with the Ministry of Industry and Trade and other specialized Ministries, and about ***28 days*** in case consultation with Ministries required. Meanwhile, under Decree 23, the total time for this license is 45 days.

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In the past, in order to grant Business License for distribution activity, the licensing authority must consult with the Ministry of Industry and Trade. Currently, **this requirement has been removed** under Decree 09 **when granting Business License for retail distribution activity** of almost goods, except for some sensitive ones (rice, sugar, recorded items, books, news and magazines). This adjustment has reduced significantly the time for implementing the administrative procedures of FDI enterprises.

Specific provisions on cases where Vietnamese enterprises having retail outlet receive foreign investment capital

Decree 09 additionally provides specific provisions on cases where Vietnamese enterprises having retail outlet receive foreign investment capital and becoming FDI enterprises under which these companies must also apply for a Business License and Retail Outlet License(s). In this particular case, Decree 09 **has added a special procedure, namely, the procedure for granting a Retail Outlet License allowing the retail outlet to continue its operation**, which is considered being legal basis for foreign investors to buy retail chains in Vietnam. It is noteworthy that the procedure for granting above Retail Outlet License **appears to exclude the Economic Needs Test (ENT)**.

License for goods not being committed to market opening, including: oil, lubricants; rice; sugar; visual records; books, news and magazine

Previously, FDI enterprises were prohibited from importing and distributing these items in Vietnam. Yet, Decree 09 creates a new legal framework **allowing the import and distribution of the above items in some special cases**: FDI enterprises producing oil and lubricants in Vietnam shall be considered to license for the import, wholesale distribution; FDI enterprises having retail outlets in the form of supermarkets are considered to license for retail distribution of rice, sugar, visual records, books, news and magazines at their retail outlets.

Adding some definitions

Decree 09 defines Retail outlet apart from the first one, convenience store, mini supermarket, commercial center, etc. However, the interpretation of these definitions and the difference between the definitions in Decree 09 and other related documents are controversial.

Although Decree 09 has the positive changes compared to Decree 23, there are still some shortcomings and possible bottlenecks in the implementation.

Adding some contents to Business License

Though the contents of retail outlet are removed in new form of Business License provided under Decree 09, some new contents are added to the new Business License form including: the legal representative of enterprise, information on investor/contributed capital members/ founding shareholder such as: name, place of registration or nationality, value of contributed capital and ratio, etc. Any change of the mentioned contents requires amendment of Business License. Therefore, new business license form creates more administrative procedures than the old provisions.

The way of recording the goods in the dossier and on the business license

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Decree 23 provided an appendix guiding the way of recording the goods for implementing import, export, and distribution rights in accordance with group of goods with HS code which previously was used for FDI companies to work with customs authority for goods import. Decree 09 has removed this guideline and silent on how to record the goods on the Business License, causing the companies and authorities may encounter problems during the regulations implementation.

Overlapping in consultation with Ministries

Decree 09 requires the Department of Industry and Trade to consult with the Ministry of Industry and Trade in most cases of granting business license, except for the case of retailing goods other than rice, sugar, visual records, books, news and magazines. However, it is noted that as to the business activities that Vietnam did not commit to open the market to foreign investors (for example: goods leasing, trade intermediation, e-commerce...), in order to carry out these business activities, FDI enterprises have to carry out both the procedure for adding the project objectives at the investment licensing authority, and procedure for Business License, and both of these procedures are required the opinions of the Ministries including the Ministry of Industry and Trade. This causes overlap in the consultation of Ministries and extension in the administrative procedures duration, unless in fact there shall be a mechanism for the reference of issued opinion of such Ministries.

The first retail outlet is obliged to obtain a separate Retail Outlet License

This regulation is newly introduced in Decree 09 while it is not required under Decree 23. This provision will overcome the fact that many FDI companies set up several new similar businesses, each of them operates a first retail outlet to avoid application for Retail Outlet License and commercial planning checking. ***The concern is that FDI enterprises which are operating the first retail outlet, when adjusting the contents of the retail outlet (name, code, address of head office of enterprise; name, address, type, size of the retail outlet, etc.) shall need to apply for a new Retail Outlet License for the first retail outlet being in operation*** including reviewing of compliance with relevant planning in the geographic market. If the first retail outlet is operating without satisfaction of planning conditions, when applying for a Retail Outlet License pursuant to Decree 09, what will be the legal consequences of that, and responsibilities of the licensing authority as well as management authority during the course of the outlet's operation?

Tightening management for convenience stores, mini supermarkets

One of the noteworthy points of Decree 09 is the addition of new regulations to manage mini supermarket, convenience stores in the context of convenience store chains, mini supermarkets involving foreign elements have been growing rapidly for recent years. In addition to the new definition of convenience stores and mini supermarkets, the Decree 09 requires ***convenience stores, mini supermarkets (apart from the first one), which usually have an area of less than 500m², even located in trade centers that suitable with commercial planning, to overcome the Economic Needs Test (ENT)***, while not required under Decree 23. The difference in governmental management in a same trade center where convenience stores, mini supermarkets are subject to ENT, while other retail outlets less than 500m² are not subject to ENT, shows the tightened management of this developing type of business.

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